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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,
Petitioners,
vs.
FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California Government Code § 84305 requires candidates for public office, and individuals or organizations that qualify as political committees, to identify themselves as the sender on mailings of more than 200 pieces of campaign literature. The questions presented are:

1. Whether California Government Code § 84305 is unconstitutional on its face under the First Amendment because it prohibits anonymity in political speech in communications within the scope of its coverage.

2. If § 84305 is unconstitutional as applied to persons other than candidates and their campaign committees, whether § 84305 is also unconstitutional under the First Amendment as applied to candidates and their campaign committees, including Petitioners in this case.

3. If § 84305 is unconstitutional as applied to persons other than candidates and their campaign committees, whether § 84305 must be invalidated for impermissible overbreadth, even if it could constitutionally be applied to Petitioners in this case.

PARTIES TO THE PROCEEDING

Petitioners in this Court are:

Daniel Griset

Griset Campaign Committee

Santa Ana Progress Committee

Respondent in this Court is:

Fair Political Practices Commission

The foregoing were also all of the parties in the courts below. There are no parent or subsidiary corporations of any party.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

LIST OF APPENDICES vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION . . 7

I. THIS PETITION SHOULD BE GRANTED BECAUSE § 84305 IMPERMISSIBLY PROHIBITS ANONYMITY IN THE POLITICAL SPEECH OF A WIDE VARIETY OF PERSONS. 9

II. THIS PETITION SHOULD BE GRANTED BECAUSE § 84305 IMPERMISSIBLY PROHIBITS ANONYMITY IN THE SPEECH OF CANDIDATES FOR PUBLIC OFFICE, AND THE CALIFORNIA SUPREME COURT ERRED IN UPHOLDING THAT STATUTE AS APPLIED TO CANDIDATES 14

Page

A. The California Court Erred In Equating A Supposed Informational Interest Served By Compelled Speaker Identification With The Informational Interest Served By Compelled Financial Disclosure 15

B. The California Court Erred In Relying On The Effect Of § 84305 In Deterring "Deceptive" Campaign Speech To Justify The Regulation Of Speech 17

C. The California Supreme Court Incorrectly Analyzed The Infringement Of § 84305 On The Rights Of Candidates, And Ignored The First Amendment's Protection For Speech Itself 19

III. THE CALIFORNIA SUPREME COURT ERRED IN FAILING TO ANALYZE THE IMPERMISSIBLE OVERBREADTH OF § 84305 AS APPLIED TO PERSONS OTHER THAN CANDIDATES, AND TO INVALIDATE IT FOR THAT REASON 23

Page

IV. THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH THE MAJORITY OF DECISIONS BY OTHER STATE AND FEDERAL COURTS THAT HAVE INVALIDATED SPEAKER IDENTIFICATION STATUTES. IT IS IMPORTANT THAT THIS COURT RESOLVE THOSE CONFLICTING DECISIONS AND CLARIFY THE FIRST AMENDMENT PRINCIPLES INVOLVED 24

CONCLUSION 27

LIST OF APPENDICES

APPENDIX A
Opinion, California Supreme Court, Filed November 28, 1994 . . . . . A1

APPENDIX B
Opinion, California Court of Appeal, Fourth Appellate District, Division Three, Filed September 30, 1992 . . . . . B1

APPENDIX C
Order, Orange County Superior Court, Filed September 19, 1991 . . . . . C1

APPENDIX D
Minute Order, Orange County Superior Court, Dated August 28, 1991 . . . . D1

APPENDIX E
Decision, Fair Political Practices Commission, Dated February 15, 1991 . . E1

APPENDIX F
California Government Code Sections 82007, 82013, 82016 and 82041.5. . . . . .F1

TABLE OF AUTHORITIES

Page

Cases

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 9, 23

Brown v. Hartlage,
456 U.S. 45 (1982). 20

Buckley v. Valeo,
424 U.S. 1 (1976) 16, 17, 20

Canon v. Justice Court,
61 Cal.2d 446 (1964) 12

Commonwealth v. Dennis,
329 N.E.2d 706 (1975). 25

Dombrowski v. Pfister,
380 U.S. 479 (1965) 23

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 11, 20, 23

McIntyre v. Ohio Elections Commission,
67 Ohio St.3d 391 [618 N.E.2d 152]
(1993), *cert. granted*, [127 L.Ed.2d 370]
114 S.Ct. 1047 (1994) (No. 93-986) 7-13, 25

Morefield v. Moore,
540 S.W.2d 873 (1976) 25

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 18

Page

People v. Duryea,
351 N.Y.S.2d 978 (1974) 13, 25

Printing Industries of Gulf Coast v. Hill,
382 F.Supp. 801 (S.D. Tex., 1974),
vacated and remanded in light of amendments, 422 U.S. 937 (1975) 25

State v. Acey,
633 S.W.2d 306 (1982) 25

State v. Barney,
448 P.2d 195 (1968) 25

State v. Burgess,
543 So.2d 1332 (1989). 25

State v. Fulton,
337 So.2d 866 (1976) 25

State v. North Dakota Ed. Ass'n,
262 N.W.2d 731 (1978) 25

State v. Petersilie,
432 S.E.2d 832 (1993) 25

Talley v. California,
362 U.S. 60 (1960). 7, 9-12, 18, 25

United States v. Insco,
365 F.Supp. 1308 (M.D. Fla. 1973) 26

United States v. Scott
195 F.Supp. 440 (D. N.D. 1961) 26

Page

Wilson v. Stocker
819 F.2d 943 (10th Cir. 1987) 17, 25

Zwickler v. Koota,
290 F. Supp. 244 (E.D.N.Y. 1968),
reversed on other grounds sub nom.
Golden v. Zwickler, 394 U.S. 103 (1969) 25

Constitutions

United States Constitution
Amendment I . . . . . *passim*
Amendment XIV, Section 1 2

California Constitution,
article III, § 3.5 6

Federal Statutes

2 U.S.C. § 441d 26
18 U.S.C. § 612 26
28 U.S.C. § 1257(a) 2

State Statutes

California Political Reform Act, Government Code
§§ 81000-91015 5
§ 82007 4
§ 82013 . . . . . 4, 10, 13
§ 82015 10
§ 82016 . . . . . 4, 24
§ 82025 10
§ 82041.5 . . . . . 4, 10
§ 82048.7 13
§ 83100- 83123 5
§ 84106 13
§ 84305 . . . . . *passim*

Page

Other State Statutes

Ala. Code §§ 17-22A-12, 17-22A-13 26
Alaska Stats. § 15.56.010. 26
Ark. Code § 7-1-103, subdiv.(8) 26
Colo. Rev. Stats. § 1-13-108 26
Conn. Gen. Stats. § 9-333w. 26
Idaho Code § 67-6614A 26
Ind. Stats. § 3-9-3-2 26
Iowa Code § 56.14 26
Md. Code art. 33, § 26-17 26
Mass. Gen. Laws ch. 56, § 41. 26
Minn. Stats. § 211B.04 26
Miss. Code §§ 23-15-897, 23-15-899 26
Mon. Code § 13-35-225 26
Neb. Rev. Stats. § 49-1474.01 26
Nev. Rev. Stat. § 294A.320. 26
N. H. Rev. Stat. § 664:14 26
N. J. Stats. § 19:34-38.1 26
N. M. Stats. §§ 1-19-16, 1-19-17 26
N.C. Gen. Stats. § 163-274, subdiv.(7) 26
Or. Rev. Stats. § 260.522 26
R. I. Gen. Laws §§ 17-23-1, 17-23-2 26
S. D. Codified Laws. § 12-25-4.1. 26
Tenn. Code § 2-19-120 26
Va. Code § 24.1-277 26
W. Va. Code § 3-8-12 26
Wis. Stats. § 11.30, subdiv.(2) 26
Wyo. Stats. § 22-25-110 26

Rules and Regulations

California Rules of Court, Rule 976(d) 1

California Code of Regulations,
Title 2, Division 6 13

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,
Petitioners,
vs.
FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners Daniel Griset, Griset Campaign Committee, and Santa Ana Progress Committee respectfully petition for a writ of certiorari to review the opinion and judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 8 Cal.4th 851 (35 Cal.Rptr. 659; 884 P.2d 116), and included as Appendix A. The California Supreme Court affirmed the judgment of the California Court of Appeal, included as Appendix B. (The opinion of the Court of Appeal is unpublished as a result of the California Supreme Court's grant of review. California Rules of Court, Rule 976(d).) The Court of Appeal

affirmed the judgment of the trial court, the Superior Court of Orange County, embodied in an order (Appendix C) and a minute order (Appendix D) which were not published. The subject of the trial court proceedings was a decision by the California Fair Political Practices Commission, in FPPC No. 88/442 (Appendix E), which was not published.

JURISDICTION

The California Supreme Court entered its judgment on November 28, 1994. (App. A 1.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

California Government Code § 84305.[1]

> (a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

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[1] As amended, Stats. 1989, Ch. 764. In 1988, the year in which the violation of this statute which gave rise to this case occurred, the statute read as it does now, except that it did not include language added by the 1989 amendment in subsection (a) reading "which shall be in a color or print which contrasts with the background so as to be easily legible." That language is not an issue in this case.

> (b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.
>
> (c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a).

California Government Code § 82007.

This section defines "candidate," as used in § 84305, as including an individual running for office in the common meaning of the term. It is set out in full in Appendix F.

California Government Code § 82013.

This section defines "committee," as used in § 84305, as including any person or group who, in a calendar year, receives contributions of $1,000 or more, or makes independent expenditures of $1,000 or more, or makes contributions of $10,000 or more. It is set out in full in Appendix F.

California Government Code § 82016.

This section defines "controlled committee" as used in § 84305 as including a committee on which a candidate has significant influence. It is set out in full in Appendix F.

California Government Code § 82041.5.

This section defines "mass mailing" as used in § 84305 as including over 200 substantially similar pieces of mail. It is set out in full in Appendix F.

STATEMENT OF THE CASE

This case began with an administrative enforcement proceeding in which the California Fair Political Practices Commission (the "FPPC"), a state agency, imposed penalties totalling $10,000 against Petitioners for sending five campaign mailings without properly identifying themselves as the senders, in violation of California Government Code § 84305.[2] (FPPC's Decision, February 15, 1991, Appendix E.)

The facts of this case are set out in the FPPC's Decision which adopted the findings and recommendations of an administrative law judge. (App. E 2-7.) In summary, Petitioner Griset sought reelection as a member of his city council at the November 8, 1988 general election, and was reelected. During the month before the election, he sent out five mailers to voters which were paid for by his two campaign committees, one by Petitioner Griset Campaign Committee and four by Petitioner Santa Ana Progress Committee. These mailers failed in various respects to comply with the applicable requirements of § 84305 that both the name of the committee that pays for a mailer, and the name of the candidate who controls the committee, be disclosed on the mailer.

Following the election, the FPPC filed an accusation alleging violations of § 84305 by Petitioners in connection with these mailings. The administrative law judge

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[2] Section 84305 is part of California's Political Reform Act, Government Code §§ 81000-91015, as amended. Sections 83100-83123 of the Act create the FPPC and give it the authority to investigate violations of the Act, to hold hearings to determine if there has been a violation, and to impose monetary penalties of up to $2,000 per violation. The FPPC followed that administrative procedure against Petitioners in this case.

recommended a penalty of $2,000 for each of the five mailers, for a total of $10,000 in penalties. (App. E 7.) The FPPC adopted that judge's findings and recommendations as its Decision. (App. E 1.)

Petitioners did not challenge the constitutionality of § 84305 in the administrative proceeding itself,[3] but filed a complaint in a state trial court (the Orange County Superior Court) seeking to restrain the FPPC's enforcement action on the grounds that § 84305 is unconstitutional under the First Amendment. The court denied Petitioners' interlocutory request for relief, but no appellate review was sought at that point.

After the FPPC's Decision, Petitioners amended their complaint to add a petition for a writ of administrative mandamus to overturn the decision of the FPPC, again on the grounds of the unconstitutionality of § 84305. Following the court's hearing on the writ petition, the court ruled that § 84305 was not unconstitutional as applied to candidates and their committees (Minute Order, August 28, 1991, Appendix D), and entered its final order denying the petition for a writ. (Order, September 19, 1991, Appendix C).

Petitioners appealed to the California Court of Appeal, which also upheld the constitutionality of § 84305 as applied to candidates and their committees, and affirmed the decision of the trial court. (Court of Appeal Opinion, September 30, 1992, App. B 1-12.) A vigorous dissent argued that § 84305 was unconstitutional on its face under the First Amendment and this Court's

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[3] The California Constitution, in article III, § 3.5, prohibits an administrative agency from declaring a statute unconstitutional, or refusing to enforce it on grounds of unconstitutionality, unless an appellate court has declared it unconstitutional.

decision in *Talley v. California*, 362 U.S. 60 (1960), and should be invalidated for that reason. (App. B 13-24.)

The Court of Appeal also judicially construed § 84305 to apply only to candidates and their committees, thereby rejecting Petitioner's challenge on the grounds of unconstitutional overbreadth as applied to other individuals and groups. (App. B 9-11.) Because the court limited the application of the statute to candidates and their controlled committees, but upheld it as to them, both the FPPC and Petitioners petitioned for review by the California Supreme Court, which granted both petitions.

The California Supreme Court upheld the validity of § 84305 as applied to candidates and their committees, including Petitioners. The court did not, however, decide the question of the validity of that section as applied to others, or judicially construe the section to limit its coverage, so in effect rejected Petitioners' overbreadth challenge. (App. A 3.)

REASONS FOR GRANTING THE PETITION

This case raises, in part, the same fundamental First Amendment issue that is presently before this Court in *McIntyre v. Ohio Elections Commission*, 67 Ohio St.3d 391 (1993), *cert. granted*, 114 S.Ct. 1047 (1994) (No. 93-986): Whether the state may constitutionally prohibit anonymity in political speech. (Questions Presented, *supra*, Question 1.)

That fundamental First Amendment issue is raised in this case by a candidate for office and his two campaign committees. This case therefore presents two additional aspects of the basic constitutional issue that are not necessarily reached in *McIntyre*, but which nevertheless have broad public significance, not only under the

California statute but under similar statutes in a number of other states:

- Whether the state may constitutionally prohibit anonymity in political speech of *a candidate for public office*, (as the California Supreme Court held in this case) even if it may not prohibit anonymity to other persons (such as an opponent of a ballot measure, like Mrs. McIntyre). (Questions Presented, *supra*, Question 2.)
- If the state may prohibit anonymity in the speech of candidates for public office (like Petitioner Griset), but may not prohibit anonymity in the political speech of other individuals or groups (like Mrs. McIntyre), whether a statute that broadly prohibits anonymity to both categories of speakers is invalid because of its impermissible overbreadth, and subject to challenge on that ground even by a candidate, including Petitioner Griset. (Questions Presented, *supra*, Question 3.)

The California Supreme Court held that the First Amendment does not prevent the state from prohibiting anonymity to persons who are candidates,[4] but declined to reach the issue of whether the state could prohibit anonymity to other persons, in effect denying Petitioners' challenge to § 84305 on grounds of impermissible overbreadth. (App. A 3.)

That decision is incorrect in both respects, under prevailing case law holding that anonymity is protected

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[4] The California Supreme Court upheld the validity of § 84305 as to candidates *and* committees controlled by candidates. For the sake of simplicity, both are often referred to together in this Petition as simply "candidates."

by the First Amendment (*Talley v. California*, 362 U.S. 60 (1960)), and that a statute that impermissibly infringes on First Amendment rights of some persons may be challenged on grounds of overbreadth, even by a person to whom it may validly be applied (*Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). Further, the California Supreme Court's decision is in conflict with a number of other state and federal court decisions that have invalidated speaker identification statutes in other states.

I.

THIS PETITION SHOULD BE GRANTED BECAUSE § 84305 IMPERMISSIBLY PROHIBITS ANONYMITY IN THE POLITICAL SPEECH OF A WIDE VARIETY OF PERSONS.

California Government Code § 84305, like the Ohio statute under consideration by this Court in *McIntyre*, regulates the speech of a wide variety of individuals and organizations concerning candidates and ballot measures. As surprising as the concept of regulating political speech may be in the face of the First Amendment, campaign speech has been too inviting a target for the California State Legislature to heed the First Amendment's admonition that the government "shall make no law . . . abridging the freedom of speech."

Although § 84305 on its face appears somewhat limited by its application to the activities of "candidates" or "committees" in sending "mass mailings," because of the definitions of those terms in California's Political Reform Act the statute actually regulates the political speech of a wide variety of individuals and groups. As defined in § 82013 (App. F 1), and by the terms used in that section but defined elsewhere in the Act, a

"committee" includes *all* persons (including, for instance, a single individual, a trade association, or a business entity, in addition to traditional political committees) who receive or make contributions or who make expenditures for political purposes (including the sending of a mass mailing) and whose political activity meets the modest monetary thresholds in § 82013.[5] "Mass mailing" is defined in § 82041.5 (App. F 2) as a mailing of more than 200 pieces, a low threshold that includes virtually all political mailings by persons covered by § 84305.

Section 84305 therefore has the same fundamental constitutional problem as does the Ohio statute under consideration in *McIntyre*: It prohibits anonymity in political speech to a wide variety of persons, and thereby infringes on a fundamental right protected by the First Amendment. (*Talley v. California, supra*, 362 U.S. 60.)

The California Supreme Court considered the constitutionality of § 84305 only in its application to candidates. (App. A 3.) The insufficiency of the California court's reasons for upholding § 84305 as applied to candidates will be discussed under heading II, *infra*. This portion of this Petition addresses the application of § 84305 to political speech by persons other than candidates — persons who may be advocating the passage or defeat of ballot measures, or who may be advocating the

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[5] A full understanding of the broad scope of § 84305 requires working through a series of definitions in the Act. A "committee" as defined in § 82013 is a broadly inclusive term because of that section's use of the terms "contribution" and "expenditure." "Contribution" includes any payment, for which full consideration is not received, "unless it is clear from the surrounding circumstances that it is not made for political purposes" (§ 82015). "Expenditure" includes any payment "unless it is clear from the surrounding circumstances that it is not made for political purposes" (§ 82025).

election or defeat of candidates but who are not candidates themselves. The constitutional infirmities of speaker identification statutes applied to persons other than candidates have been extensively argued in *McIntyre*; they will be only briefly discussed here in reference to § 84305.

A statute that infringes directly on rights of speech protected by the First Amendment can be upheld only if it serves a compelling governmental interest, and then only if it is narrowly drawn to serve that interest without unnecessary abridgment of protected rights. (*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).) Like the speaker identification ordinance invalidated in *Talley*, § 84305 fails both tests in its broad application to a wide variety of persons.

The court below in *McIntyre* found that the Ohio statute served the state's interest in identifying those responsible for false statements, and therefore distinguishable from *Talley*. (*McIntyre v. Ohio Elections Comm., supra*, 67 Ohio St.3d at 394.) The California Supreme Court also suggested that as a purpose which § 84305 serves. (App. A 15.) Section 84305, however, has the same defect in that respect that this Court found fatal to the ordinance it invalidated in *Talley*: It is not limited to speech that is false, but prohibits anonymity in all speech conveyed by means of communication within its scope, regardless of whether the speech is advocacy or a statement of fact, and regardless of whether statements of fact are true or false. That indiscriminate application to all speech was fatal to the ordinance that this Court invalidated in *Talley v. California* (*supra*, 362 U.S. at 64) and § 84305 must be invalidated for the same reason.

The Ohio court also found that state's statute served the purpose of enabling voters to evaluate the speech, by

knowing its source. (*McIntyre*, 67 Ohio at 396.) The California court also suggested this as a purpose served by § 84305: " 'It enables the public to appraise the source.' " (App. A 15, quoting *Canon v. Justice Court*, 61 Cal.2d 446, 459 (1964).) Requiring identification for the better evaluation of the speech, however, was rejected by this Court as a justification for prohibiting anonymity in *Talley*. This Court pointed out the value that anonymity has played in speech in this country's history, either to protect the expression of unpopular views (such as in the pre-revolutionary colonies), or to require readers to evaluate the content of speech on its own merits and not on the identity of the speaker (the Federalist Papers). (*Talley*, 362 U.S. at 64-65.)

Section 84305 not only fails to meet the tests of serving a compelling interest and being narrowly drawn to avoid undue infringement on protected interests, but it has adverse impacts on speech to an even greater extent than does the Ohio statute in *McIntyre*.

By requiring the identification of the speaker, § 84305 will inevitably discourage the dissemination of some speech. This Court noted in *Talley* that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (*Id.*, 362 U.S. at 65.) That observation is just as true of § 84305 because of that statute's broad coverage of a wide variety of individuals and groups who participate in political debate. Section 84305, for instance, would prohibit a group of citizens who have no other political involvement from anonymously sending a mailing to voters in their community to advocate support or opposition concerning a controversial ballot measure, if they spent more than $1,000 to do so and thereby qualified as a committee under § 82013(b). Section 84305 would prohibit an individual from anonymously mailing more

than 200 letters to voters in the community providing factual, true information detrimental to the reelection of a popular (and maybe powerful) local officeholder, if that individual had made an unrelated contribution of $10,000 to a political party that year and thereby qualified as a committee under § 82013(c). These concerned citizens, and many others similarly affected, very well might be deterred from exercising their First Amendment rights if they are required by § 84305 to put their names to their advocacy. (See *People v. Duryea*, 351 N.Y.S. 2d 978, 995 (1974), where the court gave similar examples as a reason to invalidate a speaker identification requirement.)

Additionally, § 84305, even more so than the Ohio statute in *McIntyre*, is a trap for the unwary, and a burden on speech for those who can afford to hire lawyers to ensure compliance. Determining the scope of the application of § 84305 requires not just reading the details of that section itself to determine the precise contents of the identification, and the details of type size, color, and location, but also cross-referencing to other sections of the Political Reform Act to follow the trail of definitions that actually specify who has to comply and when. (See the sections included in Appendix F, and at n. 5, *supra*.) Still other sections of the Act specify when the name of a "sponsor" must be included in the name of a committee required by § 84305 (§ 84106), and define what a "sponsor" is (§ 82048.7). The FPPC has amplified on most of the statutory definitions and requirements by regulations giving additional details concerning application of the statutory scheme. (See California Code of Regulations, Title 2, Division 6.) The complexity of the Act in defining the application of § 84305 alone creates a substantial burden on the political speech of persons whose speech is subject to it.

Well-financed statewide committees and candidates in California can and do afford lawyers to advise them on the intricacies of compliance. Candidates for local office, small groups of citizens supporting or opposing a local ballot measure that affects them, and individual citizens who want to voice their views, do so at their own risk. In California, moreover, the risk is more than the $100 imposed on Mrs. McIntyre — $2,000 per violation is a chilling threat for those who do not hire an experienced lawyer before exercising their First Amendment rights, and $10,000 is an onerous penalty to a city council candidate like Petitioner Griset.

II.

THIS PETITION SHOULD BE GRANTED BECAUSE § 84305 IMPERMISSIBLY PROHIBITS ANONYMITY IN THE SPEECH OF CANDIDATES FOR PUBLIC OFFICE, AND THE CALIFORNIA SUPREME COURT ERRED IN UPHOLDING THAT STATUTE AS APPLIED TO CANDIDATES.

Section 84305, of course, infringes on the freedom of speech of candidates in the same manner as it does on the speech of other persons. The California Supreme Court did not address the validity of § 84305 as applied to other persons, but did uphold its constitutionality as to candidates and candidate-controlled committees, including Petitioners (App. A 3.) In doing so, the California court erred in identifying the interests that it found are sufficiently compelling to justify the regulation of speech of candidates, and incorrectly analyzed the rights of candidates under the First Amendment.

In upholding § 84305 as applied to candidates, the California Supreme Court identified two principal interests which it found were served by § 84305 and which it held to be sufficiently compelling to justify the infringement on First Amendment rights: The state's interest in providing voters with information concerning candidates (App. A 13); and the state's interest in discouraging deceptive or irresponsible speech (A 15-16).[6] The court also described these interests as "the government's interests in conducting fair and honest elections and in providing prospective voters with the information necessary to make an informed choice." (App. A 9.) The California court erred, however, in finding that § 84305's prohibition against anonymity serves compelling informational interests or interests in fair and honest elections. The court also incorrectly analyzed the rights of candidates under the First Amendment.

A. The California Court Erred In Equating A Supposed Informational Interest Served By Compelled Speaker Identification With The Informational Interest Served By Compelled Financial Disclosure.

The California court found that the "informational interest" served by § 84305's compelled speaker identification requirement was sufficient to justify an infringement on the First Amendment by equating that

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[6] The California court discussed but did not decide whether the requisite test for § 84305's infringement on First Amendment rights was the "compelling interest test" or a "lesser degree of scrutiny," finding that § 84305 survives First Amendment scrutiny under either test. (App. A 12-13.)

interest with the "informational interest" that this Court found sufficient to justify campaign finance disclosure in *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). (App.A 13.) That analysis, however, is erroneous, because financial disclosure serves an interest that is distinctly different — and more compelling — than the information interest served by speaker identification. Petitioners urge this Court to grant review to make that distinction clear.

In *Buckley*, this Court considered the validity of various campaign finance limitation and disclosure requirements of the Federal Election Campaign Act under the First Amendment, and upheld some requirements and invalidated others. This Court's focus in each instance was on the influence of money on candidates. This Court first upheld the $1,000 limit on contributions to candidates, which it found served the compelling interest of limiting the actuality and appearance of corruption resulting from large individual financial contributions. (*Buckley v. Valeo, supra*, 424 U.S. at 26.) This Court then invalidated various limitations on expenditures because such limitations did not serve the interest of preventing the corrupting influence of money on candidates. (*Id.*, at 45, 53, 55.) This Court then upheld the campaign financial disclosure requirements, again describing the interests served by such disclosure in terms of the influence of money on candidates:

> "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party

> labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." [*Id.*, at 66-67.]

The first of these interests, the "informational interest" of the electorate in a candidate's sources and uses of money, is the interest relied on by the California court in upholding compelled speaker identification in § 84305. The generalized informational interest served by compelled speaker identification, however, cannot be equated with the specific informational interest concerning the influence of money that is served by financial disclosure requirements. (*Wilson v. Stocker*, 819 F.2d 943, 950 (10th Cir. 1987), rejecting the argument that compelled speaker identification serves the same interest as compelled financial disclosure was found to serve in *Buckley*, and invalidating a speaker identification statute.) Section 84305, and other speaker identification requirements, have no relationship to the interest of identifying the influence of money on a candidate.

B. The California Court Erred In Relying On The Effect Of § 84305 In Deterring "Deceptive" Campaign Speech To Justify The Regulation Of Speech.

The California court also relied on what it perceived as the effect of § 84305 in deterring deceptive campaign rhetoric as an interest that justifies that section's regulation of speech (App. 15-16), apparently equating this function with the government's interest in "fair and

honest elections" it cited as one of the purposes that would justify a speaker identification requirement. (App. A 9.) Section 84305, the court said, may deter "deceptive mailers," "prevent smear attacks" and reduce "irresponsible attacks." (App. 15.)

If by "deceptive," "smear," and "irresponsible" the court meant "false" speech, then § 84305 nevertheless has precisely the defect that this Court found fatal to the ordinance invalidated in *Talley*: It is not limited to false speech, but regulates all speech, true or false, so is overbroad. (See discussion under heading I, *supra*.)

If by "deceptive," "smear," and "irresponsible" the court means speech that might not be false, but is somehow undesirable anyway, then § 84305 must fail because it is an attempt to regulate the content of political campaign speech by raising its rhetoric to a level deemed more desirable and less distasteful. That, however, is not a permissible regulatory objective. This Court recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials." (*Id.*, at 270.) Indeed, this Court held in that case that speech concerning public officials must be given such breathing room that even false speech is protected unless it is uttered with knowledge of its falsity or reckless disregard of whether it was false or not. (*Id.*, at 279-280.) Protected speech may not be regulated indirectly by means of compelled speaker identification. We may have an interest in having campaign rhetoric conducted on a higher plane, but that is not something that the government may legislate.

C. The California Supreme Court Incorrectly Analyzed The Infringement Of § 84305 On The Rights Of Candidates, And Ignored The First Amendment's Protection For Speech Itself.

The California Supreme Court also indicated that its view of the validity of § 84305 as applied to candidates was influenced, at least in part, by the proposition that candidates do not enjoy the First Amendment right of anonymity: "A candidate, whose identity is known and who is seeking public office, has a lesser interest in anonymity" (App. A 14), and "Griset does not claim, nor could he, that a candidate for public office has a legitimate interest in expressing the candidate's views anonymously." (App. A 18-19.)

This analysis is incorrect for at least two reasons: It assumes that individuals lose their First Amendment rights by becoming candidates; and it analyzes the protection of the First Amendment solely in terms of the rights of the speaker, rather than as protection for speech itself.[7]

This Court has repeatedly emphasized the undiminished First Amendment rights of candidates. In

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[7] This analysis also assumes that a candidate will use campaign mail to express views on issues other than the lack of qualifications of the candidate's opponent, an assumption not justified in light of most campaign advertising seen today. A speaker identification requirement is hardly needed to inform the voters that candidates have the view that their opponent is unqualified. As the dissenting justice in the California Court of Appeal said, "Any reader can see that the mailings come from Griset's campaign, even though they are not specifically identified in the manner required by Government Code section 84305." (App. B 16.)

Buckley v. Valeo, supra, 424 U.S. 1, this Court upheld limitations on contributions *to* candidates, but then invalidated limits on the amount that candidates themselves could spend out of their own funds, because those limits imposed "a substantial restraint on the ability of persons to engage in protected First Amendment expression. The candidate, *no less than any other person*, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." (*Id.*, at p. 52, emphasis added.) In *Brown v. Hartlage*, 456 U.S. 45 (1982), invalidating a restriction on the speech of candidates because it was an infringement on the candidate's First Amendment rights, this Court stated that a candidate "does not lose the protection of the First Amendment when he declares himself for public office." (*Id.*, at p. 53.)

The California court also erred in analyzing the infringement of § 84305 in terms of the rights of candidates, rather than in terms of the protection of speech itself, regardless of the source. In doing so, the court made the same mistake as did the lower court in *First National Bank of Boston v. Bellotti* (*supra*, 435 U.S. 765):

> "The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether

> corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute in question] abridges expression that the First Amendment was meant to protect." [*Id.*, at 775-776.]

One of the "societal interests" that the First Amendment serves is the interest of the voters in receiving information, unfiltered by regulations imposed on the speakers, whether those speakers are candidates or others. This Petition, under heading I, *supra*, discussed the potential effect of § 84305 in discouraging speech by persons other than candidates. The California Supreme Court recognized that § 84305 may have this effect on speech by candidates also: "There may be instances when the requirement of sender identification on mass mailings will deter candidates from making mass mailings." (App. A 14.)

The potential of a prohibition of anonymity to suppress information for the voters is not just theoretical. On the national level, "opposition research" by candidates generates much of the adverse information about opponents that is disseminated by leaks to the press from sources that remain undisclosed. Yet this information can be truthful, important, and relevant to the voters. Political observers can recall press accounts of information from then-undisclosed sources that Senator Joseph Biden, a candidate for his party's nomination for president in 1988, had plagiarized some of the language in his speeches — information that was later learned to have come from the "research" efforts of one of his opponents for the nomination, whose staff leaked the information anonymously because the opponent did not want to be

associated with the disclosure. If anonymity were prohibited, that information may never have been given to the voters, and Senator Biden may have stayed in, and affected the outcome of, the race. Indeed, if anonymity were prohibited in all communication concerning public officials, the anonymous source known to this day only as "Deep Throat" would most likely never have given any information to reporters Woodward and Bernstein, and Watergate would be known only as a building.

On the local level of politics, where § 84305 has its primary application to candidates for state legislative or local office, leaks to the press rarely generate coverage the way they do concerning national figures. The only method of disseminating information to have an impact is by mail, usually financed by a candidate's campaign committee as the only source of sufficient funds to pay for such a mailing. If anonymity is prohibited in such mail, information on the local level of the type that is routinely disseminated by an "undisclosed source" through the national press will never see the light of day — and voters will be *less* informed.

Like the statute in *Bellotti*, § 84305 impermissibly abridges *speech*, regardless of whose speech it is, and must be invalidated because it does not serve any interest that is sufficiently important to justify it.

III.

THE CALIFORNIA SUPREME COURT ERRED IN FAILING TO ANALYZE THE IMPERMISSIBLE OVERBREADTH OF § 84305 AS APPLIED TO PERSONS OTHER THAN CANDIDATES, AND TO INVALIDATE IT FOR THAT REASON.

The California Supreme Court specifically declined to consider the facial validity of § 84305 as applied to persons other than candidates, or Petitioners' challenge to it on the grounds of impermissible overbreadth in that respect. (App. A 3.) As pointed out under heading I, *supra*, § 84305 regulates the political speech not only of candidates but of a wide variety of individuals and organizations, and is unconstitutional as to them. The California Supreme Court did not consider any limiting construction of § 84305. Section 84305 therefore remains in place as an infringement on political speech concerning any state or local candidate or ballot measure in California, in any communication within the scope of the statute.

Even if § 84305 could validly be applied to Petitioners, as a candidate and candidate-controlled committees, they may challenge it on grounds of impermissible overbreadth in its application to other persons. (*Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).)

Section 84305 does not even provide a clear line of demarcation between its application to candidates and their own campaign committees (a type of "controlled" committee), and other committees subject to the section, because of the definition of "controlled committee" in the Act. A committee is "controlled" by a candidate if

the candidate, the candidate's "agent" or another committee that the candidate controls "has a significant influence on the actions or decisions of the committee." (§ 82016, App. F 2.) Thus, an organization formed to support or oppose a ballot measure, or to make independent expenditures supporting or opposing a variety of candidates, would nevertheless be a committee controlled by any candidate who exercised the requisite degree of influence on it, even though the committee made no expenditures concerning that candidate's election. Section 84305 would require the speech of that committee to be identified as the speech of the candidate who has the requisite degree of influence on it.

There is virtually no end to the complexities of § 84305, but it is plainly overbroad in its application to a wide variety of persons and circumstances.

IV.

THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH THE MAJORITY OF DECISIONS BY OTHER STATE AND FEDERAL COURTS THAT HAVE INVALIDATED SPEAKER IDENTIFICATION STATUTES. IT IS IMPORTANT THAT THIS COURT RESOLVE THOSE CONFLICTING DECISIONS AND CLARIFY THE FIRST AMENDMENT PRINCIPLES INVOLVED.

Since this Court's 1960 decision in *Talley*, a number of state and federal courts have considered the constitutionality of speaker identification statutes applicable to political speech, and have reached opposite conclusions, based on differing views of the constitutional

principals involved. It is important that these conflicting decisions be resolved, and the underlying constitutional principles be clarified.

The majority of decisions have held that speaker identification requirements are unconstitutional. State statutes requiring the identification of the source of speech by or concerning political candidates have been invalidated, based on this Court's decision in *Talley*, twice in Louisiana (*State v. Burgess*, 543 So.2d 1332 (1989) and *State v. Fulton*, 337 So.2d 866 (1976)), twice in New York (*People v. Duryea*, 351 N.Y.S.2d 978 (1974) and *Zwickler v. Koota*, 290 F. Supp. 244 (E.D.N.Y. 1968), *reversed on other grounds sub nom. Golden v. Zwickler*, 394 U.S. 103 (1969)), and in North Dakota (*State v. North Dakota Ed. Ass'n*, 262 N.W.2d 731 (1978)), Oklahoma (*Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987)), and Texas (*Printing Industries of Gulf Coast v. Hill*, 382 F.Supp. 801 (S.D. Tex., 1974), *vacated and remanded in light of amendments*, 422 U.S. 937 (1975)). State statutes requiring speaker identification on political speech have also been invalidated on First Amendment grounds, independent of this Court's holding in *Talley*, in Idaho (*State v. Barney*, 448 P.2d 195 (1968)), and in Massachusetts (*Commonwealth v. Dennis*, 329 N.E.2d 706 (1975)).

By contrast, courts have upheld the constitutionality of such speaker identification statutes in cases concerning speech about candidates in Kentucky (*Morefield v. Moore*, 540 S.W.2d 873 (1976)), North Carolina (*State v. Petersilie*, 432 S.E.2d 832 (1993)), and Tennessee (*State v. Acey*, 633 S.W.2d 306 (1982)), and in a case concerning speech about a ballot measure in Ohio (*McIntyre v. Ohio Elections Commission*, 67 Ohio St.3d 391 [618 N.E.2d 152] (1993), *cert. granted*, [127 L.Ed.2d 370] 114 S.Ct. 1047 (1994) (No. 93-986)). The

constitutionality of former 18 U.S.C. § 612, requiring speaker identification on speech concerning federal candidates (similar to the requirements now found in 2 U.S.C. § 441d), has been upheld in two cases, *United States v. Insco*, 365 F.Supp. 1308 (M.D. Fla. 1973) and *United States v. Scott*, 195 F.Supp. 440 (D. N.D. 1961) (remarkable at least for its characterization of "surreptitious publications by unknown authors" concerning congressional candidates as "an evil" which Congress may proscribe "in the national interest.") (*Id.*, at 444.)

At least 26 states beside California and Ohio have statutes prohibiting anonymity in speech concerning candidates and, in most cases, ballot measures or questions.[8] Because of the conflicting decisions by state and federal courts applying this Court's holding in *Talley* to such measures, the constitutionality of these statutes will remain in doubt unless this Court establishes a clear guideline for the application of the First Amendment to such statutes.

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[8] Those statutes include Ala. Code §§ 17-22A-12, 17-22A-13; Alaska Stats. § 15.56.010; Ark. Code § 7-1-103, subdiv.(8); Colo. Rev. Stats. § 1-13-108; Conn. Gen. Stats. § 9-333w; Idaho Code § 67-6614A; Ind. Stats. § 3-9-3-2; Iowa Code § 56.14; Md. Code art. 33, § 26-17; Mass. Gen. Laws ch. 56, § 41; Minn. Stats. § 211B.04; Miss. Code §§ 23-15-897, 23-15-899; Mon. Code § 13-35-225; Neb. Rev. Stats. § 49-1474.01; Nev. Rev. Stat. § 294A.320; N. H. Rev. Stat. § 664:14; N. J. Stats. § 19:34-38.1; N. M. Stats. §§ 1-19-16, 1-19-17; N.C. Gen. Stats. § 163-274, subdiv.(7); Or. Rev. Stats. § 260.522; R. I. Gen. Laws §§ 17-23-1, 17-23-2; S. D. Codified Laws. § 12-25-4.1; Tenn. Code § 2-19-120; Va. Code § 24.1-277; W. Va. Code § 3-8-12; Wis. Stats. § 11.30, subdiv.(2); and Wyo. Stats. § 22-25-110.

CONCLUSION

This petition for a writ of certiorari should be granted.

DATED: February 24, 1995.

Respectfully submitted,

DARRYL R. WOLD
Counsel of Record

REED & DAVIDSON

Attorneys for Petitioners
DANIEL GRISET; GRISET CAMPAIGN COMMITTEE; SANTA ANA PROGRESS COMMITTEE

APPENDIX A

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IN THE
SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
NOV 28 1994
Robert Wandruff Clerk

DANIEL GRISET et al.,
Plaintiffs and Appellants,
v.
FAIR POLITICAL PRACTICES COMMISSION,
Defendant and Respondent.

S029701
Ct. App. G011724
Orange County
Super. Ct. No. 638654

This is a case about anonymity and the political process. Government Code section 84305[1] requires that candidates for public office, and individuals or groups supporting or opposing a candidate or ballot measure, must identify themselves on any mass mailings they send to prospective voters. In this case, a candidate for city council and two committees he controlled sent prospective voters five mass mailings that did not contain the identifying information required by statute. When the government agency responsible for enforcing the statute brought administrative charges against the candidate and the two committees he controlled, the candidate brought this lawsuit challenging the constitutionality of the statute. He argues that persons who send

[1] All further unlabeled statutory references are to the Government Code.

prospective voters mass mailings designed to influence the outcome of an election are entitled, under the First Amendment to the United States Constitution, to remain anonymous, and that section 84305's requirement that such persons identify themselves is therefore unconstitutional.

We conclude that section 84305 does not violate the First Amendment rights of candidates or candidate-controlled committees.

I

Daniel Griset was a candidate for reelection to the Santa Ana City Council in 1988. During the month before the election, the Griset Campaign Committee, which Griset controlled, sent prospective voters a mass mailing carrying the letterhead of the "Washington Square Neighborhood Association." The mailing failed to identify Griset or the Griset Campaign Committee as the sender. During the same month, the Santa Ana Progress Committee, also controlled by Griset, sent prospective voters four mass mailings attacking Griset's opponent, Rick Norton. The mailings — entitled "Meet the Real Rick Norton," "Swap Meet," "The 7 Lies Swap Meet Owner Rick Norton Wants You to Believe," and "Beware of Tricksters" — each identified the Santa Ana Progress Committee as the sender, but none of the mailings identified Griset as the controlling candidate.

In March 1990, the Fair Political Practices Commission (FPPC) named Griset (who won the election), the Griset Campaign Committee, and the Santa Ana Progress Committee as respondents in an enforcement action, alleging that they had violated section 84305 by sending the five mass mailings described above. Griset then filed a lawsuit to enjoin the FPPC proceedings. The trial court denied Griset's motion for a preliminary injunction, and the enforcement action proceeded. Based on stipulated facts, the FPPC found that Griset had committed five violations of section 84305. The FPPC imposed a $2,000 fine against Griset and the

Griset Campaign Committee, and an $8,000 fine against Griset and the Santa Ana Progress Committee.

The validity of Government Code section 84305 was not an issue in the administrative proceedings. Following the conclusion of those proceedings and the imposition of a fine on plaintiffs, plaintiffs added a petition for writ of administrative mandamus (Code Civ. Proc. § 1094.5) as a cause of action in the pending suit for declaratory and injunctive relief. They contended there that the statute was invalid as applied and on its face. In response to plaintiffs' subsequent motions for issuance of a peremptory writ on that cause of action and for summary adjudication and judgment in the action for declaratory and injunctive relief, the trial court denied the petition for writ of mandate. In so doing it ruled that, while there was a possibility that section 84305 might be invalid in other circumstances, the administrative action involved only candidates and their controlled committees.

The court then entered separate orders. The first denied the petition for writ of administrative mandamus. The second denied plaintiffs' motions for summary adjudication and judgment on the causes of action seeking declaratory and injunctive relief. Plaintiffs appealed only from the order denying their petition for writ of mandate.

The Court of Appeal recognized the limited basis of the trial court's ruling, agreed that section 84305 was not invalid as applied to plaintiffs, and affirmed the trial court order denying the petition for writ of administrative mandamus. Notwithstanding that conclusion, the court also considered the facial validity of the statute as it might apply not only to candidates and their controlled committees, but to all persons and entities potentially subject to its disclosure requirement. Because we agree that section 84305 is valid as applied to plaintiffs, we need not reach the broader question addressed by the Court of Appeal. We therefore affirm the judgment of the Court of Appeal, but express no view regarding the validity of section 84305 as applied to persons and entities other than candidates and their controlled committees.

In part II.A., we set forth the text of section 84305 and related statutes. In part II.B., we review the leading cases from the United States Supreme Court that govern the question whether a statute that bars anonymous mailings in political campaigns violates the First Amendment rights of candidates or candidate-controlled committees. In part III., we apply the principles derived from precedent to analyze the constitutionality of section 84305.

II

A

Section 84305, the challenged statute, provides:

"(a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

"(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

"(c) If the sender of the mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a)."

Section 82041.5 defines "mass mailing" in these words: " 'Mass mailing' means over two hundred substantially similar pieces of mail, but does not include a form letter or

other mail which is sent in response to an unsolicited request, letter or other inquiry."[2]

B

Although the United States Supreme Court has never addressed the precise question that confronts us — whether a statute that prohibits anonymous mass mailings by candidates or candidate-controlled committees in political campaigns violates the First Amendment — the high court in several opinions has discussed the degree to which government entities may compel the identification of persons engaged in activities protected by the First Amendment.

In three cases, all decided between 1958 and 1960, the high court rejected as unconstitutional attempts by state and local governments to require disclosure of names of persons exercising their First Amendment rights. *N.A.A.C.P. v.*

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[2] Section 82013 defines the term "committee" as follows: " 'Committee' means any person or combination of persons who directly or indirectly does any of the following: [¶] (a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year. [¶] (b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or [¶] (c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees."

As to the meaning of "controlled committee," section 82016 states: " 'Controlled committee' means a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee."

The statutory scheme does not define "sender." But the FPPC has, by regulation, defined "sender" as "the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing . . . ." (Cal. Code Regs., tit.2, § 18435, subd. (b).)

Alabama (1958) 357 U.S. 449 is the first of these cases. There, the State of Alabama sought to compel the National Association for the Advancement of Colored People (NAACP), a civil rights organization, to produce a list of all its members in the state, contending that the list was relevant to pending litigation to determine whether the organization was conducting intrastate business in violation of the state's foreign corporation registration statute. The NAACP showed that on previous occasions revealing the identity of its members had subjected those members to economic reprisals and physical threats. The high court held that the state could not compel the NAACP to disclose its membership list. The court explained that the state's justification for ordering disclosure was inadequate to justify "the deterrent effect on the free enjoyment of the right to associate" that disclosure was likely to cause. (*Id.* at p. 466.)

In the second case, *Bates v. City of Little Rock* (1960) 361 U.S. 516, the governmental entities advanced a different justification for compelling disclosure, but the result was the same as in *N.A.A.C.P. v. Alabama, supra*, 357 U.S. 449. In *Bates*, ordinances of two Arkansas cities required nonprofit organizations to provide the cities with lists of the names of local members. The local branches of the NAACP refused to provide such lists; they showed that public identification of their members had in the past led to harassment and threats of injury, and that economic reprisals were likely to follow disclosure. The high court rejected the cities' claim that disclosure was necessary to determine whether the NAACP was entitled to tax-exempt status, reasoning that although the asserted governmental purpose was "fundamental," the cities had not shown that disclosure bore a "reasonable relationship" to the achievement of that purpose, whereas disclosure would significantly impair the associational rights of the members of the NAACP.

The third case to consider the rights to anonymity of persons engaged in First Amendment activities did not involve the associational rights upheld in *N.A.A.C.P.* and

Bates; rather, as in this case, it concerned the right to anonymity for persons engaged in political speech. In *Talley v. California* (1960) 362 U.S. 60, 61, the high court considered the validity of a Los Angeles ordinance that prohibited the distribution of "any hand-bill in any place under any circumstances" that did not have on its face the name and address of the "person who printed, wrote, compiled or manufactured" it, and the name and address of the person who distributed it.

The high court invalidated the ordinance because it abridged the First Amendment by requiring persons circulating handbills to identify themselves. The court explained that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance" (*Talley v. California, supra*, 362 U.S. at p. 65), pointing out that anonymous writings and documents published under fictitious names (for example, the Federalist Papers) had played an important and beneficial historical role in the political process in this country and in England. The court rejected the claim made by the City of Los Angeles that the ordinance was necessary to identify persons responsible for fraud, false advertising, and libel, noting that the ordinance was not limited in a manner directed to identify those engaged in such conduct.

Thus, in the three cases discussed above, the United States Supreme Court established that governmental entities may not, absent substantial justification, compel those engaged in First Amendment activities to identify themselves when identification would impair their ability to engage in those activities; the high court also established that any statute requiring disclosure must bear a reasonable relationship to the asserted governmental purpose and must be narrowly tailored to achieve that purpose. But in two more recent cases, the high court has held that the government's need to ensure the integrity and reliability of the electoral process will, at least in some instances, provide an adequate justification to compel those exercising their First Amendment rights

to identify themselves. These two cases are *Buckley v. Valeo* (1976) 424 U.S. 1 (hereafter *Buckley*), and *First Nat. Bank of Boston v. Bellotti* (1978) 435 U.S. 765.

In *Buckley, supra*, 424 U.S. 1, a landmark decision on election reform law, the United States Supreme Court upheld the constitutionality of federal laws requiring compulsory disclosure to federal election officials of the identities of persons making political campaign contributions or expenditures greater than $10, and public disclosure of contributors giving more than $100. The court summarized the general principles:

"[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. [Citations.] [¶] . . . [S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* [*supra*, 357 U.S. 449], we have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." (*Buckley, supra*, 424 U.S. at p. 64, fns. omitted.)

In *Buckley, supra*, 424 U.S. 1, the government asserted three justifications for compelling disclosure of the names of those making political contributions: (1) to "allow[] voters to place each candidate in the political spectrum . . . [and to] alert the voter to the interests to which a candidate is most likely to be responsive"; (2) to "deter actual corruption and avoid the appearance of corruption by exposing large contributions . . . to the light of publicity"; and (3) to enable election officials to gather "the data necessary to detect violations of the contribution limitations [of the federal elections law]." (424 U.S. at pp. 67-68, fn. omitted.) The court found that these interests were "sufficiently important to outweigh the possibility of infringement" of First

Amendment rights because, in part, disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." (424 U.S. at pp. 66-67, fn. omitted.)

Thereafter, in *First Nat. Bank of Boston v. Bellotti, supra*, 435 U.S. 765, the high court struck down a statute that made it unlawful for a business corporation to make contributions or expenditures to influence the vote on any ballot measure question, except one that materially affected the property, business, or assets of the corporation. In the course of its analysis, the court commented on the power of government entities to compel disclosure of those engaged in political speech, observing that voters were entitled to consider "the *source* and credibility" of those who advocated positions in electoral campaigns. (435 U.S. at pp. 791-792, italics added.) The court went on to explain: "Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. *Identification of the source of advertising may be required as a means of disclosure*, so that the people will be able to evaluate the arguments to which they are being subjected. [Citations.] In addition, we emphasized in *Buckley* [*supra*, 424 U.S. 1] the prophylactic effect of requiring that the source of the communication be disclosed." (*First Nat. Bank of Boston v. Bellotti, supra*, 435 U.S. at p. 792, fn. 32, italics added.)

In short, what we learn from these five decisions of the United States Supreme Court is this: Courts must carefully examine governmental limitations on the right of those who wish to remain anonymous while exercising their First Amendment rights. In some circumstances, however, the government's interests in conducting fair and honest elections and in providing prospective voters with the information necessary to make an informed choice may justify a requirement that persons identify themselves when they engage in speech designed to influence the outcome of elections. Whether these governmental interests permit us to

uphold the constitutionality of section 84305, which prohibits anonymous mass mailings by candidates or candidate-controlled committees in election campaigns, is the issue we explore below.

III

As noted earlier, Griset, a candidate for public office, violated section 84305, which requires that candidates for public office, and individuals and groups supporting or opposing a candidate or ballot measure, must identify themselves in any mass mailings they send to prospective voters. Griset attacks that portion of the Court of Appeal's opinion upholding the constitutionality of the statute as applied to mass mailings by candidates and their controlled committees in elections for public office.

Griset contends that section 84305 implicates the First Amendment because it prohibits anonymous political speech. As he points out, political speech is at the core of the First Amendment: " '[T]he First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.' " (*Burson v. Freeman* (1992) __ U.S. __, __ [112 S.Ct.1846, 1850].) By requiring candidates and the committees they control that send mass mailings to identify themselves, Griset argues, section 84305 has a chilling effect on those who would like to engage in political speech. Thus, he asserts, it is similar to an ordinance requiring the authors of handbills to identify themselves, such as the one that the high court struck down in *Talley v. California, supra*, 362 U.S. 60. In Griset's view, a statute that infringes First Amendment rights may be upheld only if it is narrowly tailored to serve a compelling governmental interest. Section 84305, Griset contends, does not serve "sufficiently legitimate" governmental interests, and is not tailored narrowly enough to survive constitutional scrutiny.

Griset is correct that section 84305 implicates First Amendment rights because it prohibits anonymous political

speech. In this respect, it does not differ from the ordinance of the City of Los Angeles that the United States Supreme Court invalidated in *Talley v. California, supra*, 362 U.S. 60. As the high court said in *Talley*: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (362 U.S. at p. 64.)

The second proposition of Griset's argument — that a statute prohibiting anonymous mass mailings in political campaigns may be upheld only if it is narrowly tailored to serve a compelling governmental interest — has not been conclusively resolved. This is the test most frequently applied to statutes or ordinances that burden First Amendment freedoms, and it was applied by the high court when, in *Burson v. Freeman, supra*, __ U.S. __ [112 S.Ct. 1846], it upheld a Tennessee law prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the polls. But in *Buckley, supra*, 424 U.S. at page 64, the United States Supreme Court phrased the standard in somewhat different terms: "[T]he subordinating interests of the State must survive exacting scrutiny [and there must be] a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." (Fns. omitted.)

Moreover, there is recent authority from the United States Supreme Court indicating that, in at least some election law cases, a lesser degree of scrutiny may be appropriate. In *Burdick v. Takushi* (1992) 504 U.S. __ [112 S.Ct. 2059], the high court held that a state statute prohibiting voters from casting write-in votes for candidates did not violate the First Amendment. In reaching this conclusion, the court explained that the compelling interest test need not invariably be applied in election law cases: "[T]he rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . [W]hen those rights are subjected to 'severe' restrictions, the regulation

must be 'narrowly drawn to advance a state interest of compelling importance.' [Citation.] But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Id.* at pp. 2063-2064.)

Earlier this year, the high court granted review of an Ohio case in which it is likely to shed further light on the appropriate standard to apply in assessing the constitutionality of election laws. In *McIntyre v. Ohio Elections Comm.* (Ohio 1993) 618 N.E.2d 152, certiorari granted February 22, 1994, __ U.S. __ [114 S.Ct. 1047], the Ohio Supreme Court determined that the relaxed standard of constitutional scrutiny set forth in *Burdick v. Takushi, supra*, 504 U.S. __ [112 S.Ct. 2059], applied to a challenge to a state law prohibiting distribution of campaign literature that did not identify the sponsor or responsible person. Concluding that the law imposed only a minor burden that was justified by the state's interest in an informed electorate, the Ohio court upheld the law against a First Amendment challenge.[3]

In this case, we need not decide whether we agree with the Ohio Supreme Court that the relaxed standard enunciated in *Burdick v. Takushi, supra*, 504 U.S. __ [112 S.Ct. 2059], governs cases, such as this one, involving the rights of

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[3] The Ohio Supreme Court is not the first court to pass on the constitutional validity of a statute that prohibits anonymous political advertising. (*Compare United States v. Insco* (M.D. Fla. 1973) 365 F.Supp. 1308 [upholding statute], revd. on other grounds (5th Cir. 1974) 496 F.2d 204; *United States v. Scott* (D. N.D. 1961) 195 F.Supp. 440 [same]; and *Morefield v. Moore* (Ky. 1976) 540 S.W.2d 873 [same] with *State v. North Dakota Education Assn.* (N.D. 1978) 262 N.W.2d 731 [holding statute unconstitutional]; *Commonwealth v. Dennis* (Mass. 1975) 329 N.E.2d 706; and *State v. Fulton* (La. 1976) 337 So.2d 866 [holding statute unenforceable]; see Annot., Validity and Construction of State Statute Prohibiting Anonymous Political Advertising (1981) 4 A.L.R.4th 741.)

candidates and candidate-controlled committees who wish to influence voters. Whether we use a "compelling interest" test, the test the high court articulated in *Buckley, supra*, 424 U.S. 1, or the one in *Burdick*, we conclude that section 84305 as applied to candidates and candidate-controlled committees survives First Amendment scrutiny.

The state's interests that justify section 84305 are compelling. The statute is part of the Political Reform Act of 1974 (§ 81000 et seq.) The provisions of the act requiring disclosure of expenditures in election campaigns have two purposes: to inform the electorate and to prevent corruption of the electoral process. (§ 81002, subd. (a).) These interests have been held to be compelling. (*Socialist Workers etc. Committee v. Brown* (1975) 53 Cal.App.3d 879, 888-889.) Here, the FPPC asserts that both of these interests justify the requirements of section 84305.

The primary interest asserted by the FPPC in support of the statute at issue — to provide the voters with information to aid them in making their choices at the ballot box — is virtually identical to the primary interest asserted by the federal government in *Buckley, supra*, 424 U.S. 1, 66-67: that is, to assure that the electorate has information regarding the source of political campaign funds so as to enable the voters to better evaluate candidates for public office.

This governmental interest is of sufficient magnitude to permit the restriction on the First Amendment rights of candidates (and committees controlled by them) who wish to send political mass mailings anonymously. In *Buckley, supra*, the high court characterized as "substantial" the government's interest in providing the electorate with information to aid the voters in evaluating candidates for public office. (424 U.S. at pp. 66-68.) Here, in determining the constitutionality of section 84305, we must consider this state interest against the extent of the burden the statute places on candidates and committees they control. (424 U.S. at p. 68.)

Section 84305 does not in any way prohibit the communication of ideas. It does not attempt to regulate the content of expression. Nor does it restrict the quantity of speech. It merely requires sender identification for a narrow range of public speech — speech designed to influence the outcome of an election. Thus, the restraint on First Amendment freedoms is carefully limited.

On the other hand, as stated earlier, the state's interest in a well-informed electorate is a compelling one. Section 84305 seeks to further the First Amendment values of informed and open political debate and exercise of the electoral franchise. And, in requiring candidates and the committees controlled by them to disclose their identities in mass mailings, the statute is narrowly drawn to meet that goal. Voters have a vital interest in learning the views of those who seek to govern them, for only through learning these views can the voter intelligently decide who to vote for. A candidate, whose identity is known and who is seeking public office, has a lesser interest in anonymity. The statute does not require disclosure of a wide range of information pertaining to the candidate or committee responsible for the mass-mailing; it merely requires disclosure of the name and address of the candidate or committee, and, when mailings are sent by a candidate-controlled committee, the name of the controlling candidate. The disclosure must be made with the mailing itself, so that the voter will have the information when he or she reviews the mailing. (See *Buckley, supra*, 424 U.S. at p. 68, fn. 82 [holding that postelection disclosure by successful candidates would not serve the important informational function played by pre-election reporting].) Thus, the statute requires a minimal disclosure of information precisely at a highly relevant time.

There may be instances when the requirement of sender identification on mass mailings will deter candidates from making mass mailings. (See *Buckley, supra*, 424 U.S. at p. 68.) Faced with a requirement that they identify themselves in all election-related mass mailings, candidates may choose

not to send certain mailings at all. But in our view, instances in which candidates are deterred from mailing relevant, *truthful* information about themselves or their opponents will be rare, because with or without anonymity, the candidate's own desire to win the election will encourage candidates to inform voters of their views and to provide prospective voters with unfavorable information concerning their opponents. Candidates may, however, be deterred from sending *deceptive* mailers. (See *Canon v. Justice Court* (1964) 61 Cal.2d 446.) In *Canon*, the court considered the constitutional validity of former Elections Code section 12047, which made it unlawful to write or distribute literature making personal attacks on candidates for public office unless the writing contained the name and address of the printer and either the names and addresses of two officers of the organization issuing it, or the name and address of " 'some voter of this State, who is responsible for it.' " (61 Cal.2d at p. 460.) Although we invalidated the statute on the ground that it discriminated against persons who were not California voters, we rejected as "unsound" the contention that the statute violated the state and federal constitutional guarantees of freedom of speech. (61 Cal.2d at p. 451.) We explained: "[A]nonymity all too often lends itself, in the context of attacks upon candidates in the preelection period, to smears, as a result of which the electorate is deceived. Identification permits confrontation and often makes refutation easier and more effective. It tends to reduce irresponsibility. It enables the public to appraise the source." (61 Cal.2d at p. 459.)

Like former Elections Code section 12407, which was at issue in *Canon v. Justice Court, supra*, 61 Cal.2d 446, section 84305 tends to prevent smear attacks on candidates for public office, while permitting the candidate attacked to confront his or her accuser and to rebut the accusations. This is likely to reduce irresponsible attacks on candidates for public office and it will enable the voting public to appraise the source of the attacks, thereby assisting them in giving the

attacks the weight they deserve. These important public purposes, which we relied upon in *Canon* to conclude that former Elections Code section 12407 did not violate the First Amendment, support our conclusion in this case that section 84305, too, withstands constitutional scrutiny.

Here, in arguing that section 84395's failure to distinguish between protected and unprotected speech is a defect that renders that statute unconstitutional, Griset places substantial reliance on a Court of Appeal decision, *Schuster v. Municipal Court* (1980) 109 Cal.App.3d 887 (hereafter *Schuster*). That case, however, does not aid him, as we shall explain.

Schuster, supra, 109 Cal.App.3d 887, addressed the constitutional validity of former Elections Code section 29410, which made it a misdemeanor for any person to reproduce any written matter relating to an election unless the matter reproduced contained the name and address of the business or residence of a person responsible for it, or of a registered campaign committee. The court held that Election Code section 29410's identification requirement violated the First Amendment. It distinguished the statute from the one at issue in *Canon v. Justice Court, supra*, 61 Cal.2d 446, on the basis that the statute in *Canon* reached only false and defamatory speech that was not protected by the First Amendment. (109 Cal.App.3d at p. 895.) The *Schuster* court also distinguished the high court's decision in *Buckley, supra*, 424 U.S. 1, which upheld compulsory disclosure of the identities of those who make political campaign contributions or expenditures. As discussed in part II.B., *ante*, the governmental interests at stake in *Buckley* were (1) promoting an informed electorate, (2) deterring corruption by making public large contributions and expenditures, and (3) gathering information in order to detect violations of the contribution limitations of the federal law. (*Buckley, supra*, 424 U.S. at pp. 67-68.) In *Schuster*, the Court of Appeal concluded that because only *one* of the three interests present in *Buckley* — the compelling state interest in promoting an informed electorate — was present in the case

before it, *Buckley* was distinguishable. (*Schuster, supra*, 109 Cal.App.3d at pp. 898-899.)

But *Buckley, supra*, 424 U.S. 1, is not so easily distinguished. The United States Supreme Court has never indicated that the constitutional validity of a statute depends on the number of governmental interests that are alleged to be served by the statute. Although the court in *Buckley* was confronted with an assertion of multiple governmental interests, the high court never suggested that any one of these interests, standing alone, would be insufficient.

Relying on the Court of Appeal's decision in *Schuster, supra*, 109 Cal.App.3d 887, Griset contends that only false or defamatory speech can be subject to compelled disclosure. This theory, however, cannot be reconciled with the high court's decision in *Buckley, supra*, 424 U.S. 1, which upheld the constitutionality of disclosure requirements not aimed at false or defamatory speech. (*Id.* at pp. 65-68.)

Griset also argues that the government's interest in the integrity of the electoral process is too "abstract" to adequately justify section 84305. He reasons that even if this governmental interest is a compelling one, section 84305, as written, will not implement it. We disagree.

The facts of this case demonstrate how section 84305 operates directly to preserve the integrity of the electoral process. Griset sent at least one mass mailing — purporting to be from the Washington Square Neighborhood Association — that attacked third parties for actions favorable to Griset's opponent while omitting any information that would tell the reader that Griset and his committee paid for the mass mailing. Prospective voters reading this mass mailing may have been deceived into believing that this mailing came from a "grass-roots" group of concerned neighbors, rather than from a candidate for public office. Had Griset complied with section 84305, the prospective voters reading the mass

mailing would have been better able to give it the weight it deserved.[4]

Additionally, Griset argues that the high court's decision in *Buckley, supra*, 424 U.S. 1, does not support the FPPC's position because in *Buckley* the court distinguished between expenditure limitations, which are "direct" restrictions of speech and were invalidated by the court, and contribution limits, which "involve[] little direct restraint on . . . political communication" and were upheld. (424 U.S. at p. 21.) According to Griset, section 84305's requirement that senders of mass mailings identify themselves is a "direct" restriction of speech equivalent to an expenditure limitation, and therefore invalid.

This is unpersuasive. In *Buckley, supra*, 424 U.S. 1, the court equated the quantity of an individual's or group's expenditures on political campaigns with the quantity of speech. "A restriction on the amount of money a person or group can spend on political communication . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." (*Id.* at p. 19, fn. omitted.) By contrast, a mass mailing identification statute such as section 84305 does not "necessarily reduce the quantity of expression"; candidates and the committees they control remain free to discuss as many issues as they wish in as many mailings as they can afford, and to explore these issues in any depth. Section 84305 merely requires that they identify themselves to the prospective voters whom they seek to persuade. Griset does not claim, nor could he, that a

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[4] Amicus curiae California Political Attorneys Association argues that the application and enforcement of section 84305 by the FPPC in past administrative cases shows that it is not narrowly tailored to further a compelling state interest. But the manner in which the FPPC has applied the statute in past enforcement decisions tells us nothing about whether the statute is, as Griset contends, unconstitutional insofar as it applies to candidates and their controlled committees, or as applied in this case.

candidate for public office has a legitimate interest in expressing the candidate's views anonymously.

By requiring candidates and the committees they control to identify themselves in their mass mailings, section 84305 is narrowly tailored to serve a compelling state interest: to provide the voters with important information to assist them in making a reasoned choice at the polls, the ultimate expression of their First Amendment rights. Accordingly, we conclude that as applied to candidates and their controlled committees section 84305 does not violate the First Amendment.[5]

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[5] Griset also asserts that section 84305 violates the "liberty of speech" clause of the California Constitution, which states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).) Griset, however, presents no argument on this provision of our state Constitution apart from his argument based on the First Amendment. Instead, he relies on *Schuster*, *supra*, 109 Cal.App.3d 887, in which the Court of Appeal held former Elections Code section 29410 violative of the state constitutional protection of speech. But *Schuster* itself offered no analysis demonstrating that application of the state Constitution required a different analysis or led to a different result than application of the federal charter.

As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart. (See, e.g., *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658 [state free speech guarantee is "more definitive and inclusive than the First Amendment"].) We are not persuaded, however, that the state Constitution requires a different analysis or result on the narrow question that we address in this case. Indeed, the challenged statute is in conformance with the literal terms of the liberty of speech clause; it does not restrain Griset as a candidate, or committees he controls from freely expressing his views in any way, but merely requires that he identify himself, or, in other words, that he "be[ ] responsible for the abuse of this right." (Cal. Const., art. I, § 2, subd. (a).)

IV

The Court of Appeal correctly held that section 84305, which requires the senders of mass mailings in political campaigns to identify themselves, is not unconstitutional as applied to candidates and candidate-controlled committees.

The judgment of the Court of Appeal is affirmed.

KENNARD, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
ARABIAN, J.
BAXTER, J.
GEORGE, J.
WERDEGAR, J.

APPENDIX B

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

Court of Appeal
4th Dist. Div. 3
FILED
SEP 30 1992

Deputy Clerk

DANIEL GRISET et al.,
Plaintiffs and Appellants,
v.
FAIR POLITICAL PRACTICES COMMISSION,
Defendant and Respondent.

G011724
(Super.Ct.No. 63-86-54)

OPINION

APPEAL from a judgment of the Superior Court of Orange County, Robert A. Knox, Judge. Affirmed.

Reed & Davidson and Darryl R. Wold for Plaintiffs and Appellants.

Scott Hallabrin, Jeevan S. Ahuja, Deanne Stone and Jonathan Rothman for Defendant and Respondent.

Daniel Griset, the Griset Campaign Committee and the Santa Ana Progress Committee appeal the trial court's denial of their petition for writ of mandamus, which challenged

punitive measures undertaken against them by the Fair Political Practices Commission (FPPC). An administrative law judge fined Griset and both committees, controlled by Griset, for sending mass candidate mailings[1] without disclosing the name of the sender, in derogation of Government Code section 84305.[2] Appellants contend the section is unconstitutional.

I

Griset was seeking election to the Santa Ana City Council at the time of the subject mailings. Prior to the administrative hearing on the appellants' failure to comply with the statute, they sought injunctive relief to ban any FPPC action. The court determined Griset and his controlled committees were not entitled to the anonymity which is constitutionally provided to noncandidate individuals and noncandidate-controlled groups: "It is clearly of compelling state interest

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[1] The five mailings represented one batch of 300 and four of 29,000.

[2] All statutory references are to the Government Code unless otherwise specified.

Section 84305 provides: "(a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of the mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

"(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

"(c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a)."

that the public be fully informed about the political opinions of political candidates." Moreover, "Since there has been no unconstitutional inhibition upon freedom of expression to the plaintiffs in the present situation, the Court holds that Government Code section 84305 is validly imposed upon the actions of the plaintiffs even though there is a possibility that under some circumstances the statute could be unconstitutionally overbroad."

Following a hearing, the administrative law judge found the appellants had not complied with the statute. Griset and the Griset Campaign Committee were fined $2,000; he and the Santa Ana Progress Committee were fined $8,000. The FPPC adopted the decision of the administrative law judge and imposed the recommended $10,000 fine. Appellants petitioned for a writ of mandamus (seeking rescission of the decision), declaratory relief (again claiming § 84305 is unconstitutional), and injunctive relief (enjoining enforcement of the penalties). Their motions for a peremptory writ and for summary judgment were denied.

Appellants appeal the ruling and request that we find section 84305 unconstitutional, as applied and on its face.

II

Section 84305 is contained in title 9 of the Government Code (the Political Reform Act, added by initiative measure approved by the voters June 4, 1974), chapter 4 (dealing with campaign disclosures in general), article 3 (specifically addressing prohibitions or limitations on contributions and expenditures). Other sections in article 3 require (1) the name of a donor or payee making a contribution in excess of $100 (§ 84300); (2) a contribution be made only in the legal name of a donor (§ 84301); (3) the names and addresses of both the principal and agent where contribution is by the agent (§ 84302); (4) the candidate to report any expenditure by an independent contractor (§ 84303); and (5) any

contribution in excess of $100, by an anonymous donor, be paid to the state (§ 84304).

Section 84305 forbids any mass mailings "unless the name, street address, and city of the candidate or committee are shown on the outside of each piece . . . ."

III

Appellants contend section 84305 is unconstitutional because it prevents anonymous political speech that is protected by the First Amendment. We agree appellants were engaged in political speech, regulation of which "touches the core of First Amendment protection." (*Schuster v. Municipal Court* (1980) 109 Cal.App.3d 887, 892.) "The First Amendment exists to protect free discussion of *governmental affairs* [citation], for 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' [Citation.] The constitutional safeguard was fashioned 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' [Citations.]" (*Ibid.*) "Since disclosure requirements undoubtedly tend to restrict the freedom to distribute and consequently deter free speech, the latter right encompasses the right to remain anonymous. [Citations.]" (*Ibid.*)

However, this protection, like that afforded any other activity covered by the First Amendment, is not unlimited. For this reason, *Talley v. State of California* (1960) 362 U.S. 60, upon which *Schuster* relies, is not the answer to the appellants' prayers. There, the Supreme Court did, indeed, strike down an ordinance forbidding the distribution of handbills unless the documents identified the author: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (*Id.* at p. 64.) But the court made clear it (1) was examining a "broad ordinance . . . barring distribution of 'any hand-bill in any place under any

circumstances' " (*Id.* at p. 63) and (2) *was not* passing "on the validity of an ordinance limited to prevent supposed evils." (*Id.* at p. 64.)

The ordinance in *Talley* applied to *anyone* who wished to distribute information. Here, the statute reaches only a specified few. *Talley* noted that "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." (*Id.* at p. 65.) The obvious corollary is that there are times and circumstances when they may be so compelled. Our initial issue is whether this is one of those situations.

Schuster v. Municipal Court, supra, 109 Cal.App.3d 887, too, dealt with a statute which prohibited "*all* anonymous political campaign literature" by *all* persons. (*Id.* at pp. 890-891, emphasis added.) And, again, the court recognized that the right of free speech "is not absolute." (*Id.* at p. 893.)

We examine application of the statute to Griset and his personally controlled campaign committees, recognizing that "[t]his title should be liberally construed to accomplish its purposes." (§ 81003.) There is a significant government interest in preserving the integrity of the electoral process, to avoid the very situation we find in our land today: Voter disenchantment, leading to a feeling of helplessness at the polls and a tendency not to vote at all. "The dual purpose of . . . the Political Reform Act of 1974 is to inform the electorate and to prevent the corruption of the political process. The achievement of these objectives promotes a compelling state interest. [Citations.]" (*Socialist Workers etc. Committee v. Brown* (1974) 53 Cal.App.3d 879, 888-889, fn. omitted.)[3]

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[3] The FPPC offered below a second argument in support of the state's interest — providing an "audit trail." Because title 9 addresses identification of contributions received and expenditures, as well as contributors, it contended the costs involved in sending the mailers were then easily traced to a particular candidate. We mention, but do not stress, this point.

The state has a compelling interest in an informed electorate, in assuring that the voters are provided with information which will aid them in evaluating the candidates. This interest is surely not advanced by allowing *candidates* anonymous access to the voters. The candidate is, after all, the one who *chose* to place himself or herself in the lime$_{light.}$ This choice a fortiori must include self-identification when the candidate publicly voices a position. Moreover, attacks on an opponent may have their place in a contested race, but *anonymous* attacks *by a candidate* do not.

The *Talley* court waxed eloquent for a moment on those of our forefathers who had no choice during "the obnoxious press licensing law of England"; i.e., they were "able to criticize oppressive practices and laws either anonymously or not at all." (*Talley v. State of California, supra*, 362 U.S. 60, 64.) Thus did the court uphold striking a total ban on unsigned handbills: "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (*Id.* at p. 65.) The latter — "perfectly peaceful discussions of public matters of importance" — are supposedly what one running for office wishes to place before the voters, and precisely what we expect and are entitled to demand of our candidates for office. Distinguishing one's stand from that of an opponent is an important and proper method of informing the electorate about one's position as a candidate. It allows for open debate as well as questions from the constituents. Anonymous jabbing at an opponent does not.

In *Canon v. Justice Court* (1964) 61 Cal.2d 446, appellant was charged with violation of section 12047 of the Elections Code, which made it a misdemeanor for anyone to distribute materials " 'designed to injure or defeat any candidate . . . by reflecting upon his personal character or political action' " (*id.* at p. 449, fn. 1) unless signed by the printer and the person responsible. Although finding the statute unconstitutionally discriminatory, the court held it *did not* infringe on freedom of speech. First, said the court, "The statute does

not prohibit the communication of ideas, nor does it attempt to regulate the content of expression. It forbids only anonymity . . . with respect to a limited range of expression . . . ." (*Id.* at p. 451.) The reasons set forth there are equally applicable to Griset and his controlled committees: "[The statute] requires identification so that (1) the electorate may be better able to evaluate campaign material by examination of the competence and credibility of its source, (2) irresponsible attacks will be deterred, (3) candidates may be better able to refute or rebut charges — so that elections will be the expression of the will of an undeceived, well-informed public. It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.' [Citation.]" (*Id.* at pp. 452-453.) Second, requiring disclosure has "some inhibitory effect" but "does not invalidate the statute." (*Id.* at p. 454.) "[A]nonymity all too often lends itself, in the context of attacks upon candidates in the preelection period, to smears, as a result of which the electorate is deceived. Identification permits confrontation and often makes refutation easier and more effective. It tends to reduce irresponsibility. It enables the public to appraise the source." (*Id.* at p. 459.)

In *Talley*, the public would run the risk of being *less* informed if the limitations were allowed to stand; because the ban was "across the board," expression of unpopular views would be heavily curtailed. Here, the candidate, by entering the race, has presumably chosen to present his or her position on the issues; he or she wants the public to agree. Voters will likely be *better* informed with the limitations intact. We avoid political subterfuge; an office seeker cannot present one picture publicly, while anonymously pressing another in mass mailings.

We emphasize that, at this stage, we are addressing the prohibition of anonymity *for a candidate* in relation to his or her own campaign. "It must be remembered that the right of freedom of speech is primarily intended to protect minority

views." (*Huntley v. Public Util. Com.* (1968) 69 Cal.2d 67, 73.) While a candidate may assuredly be possessed of a "minority view," we just as assuredly have no state interest in protecting that view, as it relates to his or her candidacy, from examination by the voting public. Just the opposite. Whether the speech is good, bad or indifferent, the electorate is entitled to know the thinking of those who seek to govern. Accountability is one of the keystones of the Political Reform Act and properly so.[4] Section 84305, as applied to Griset and his controlled committees, promotes the state's compelling interest in an informed electorate.

IV.

Overbreadth

Appellants contend that, even if the statute is constitutional as applied to them, it is unconstitutionally overbroad on two levels. First, they point to the persons and groups covered by the section — "no candidate or committee" — which attaches impermissibly to persons (other than Griset and his personal campaign committees) whose speech may not be regulated.[5] Two courts below, both before and after

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[4] There is no question of limiting the candidate's communication of ideas and no censorship of any kind as to the content of his or her political expressions.

[5] " 'Committee' means any person or combination of persons who directly or indirectly does any of the following: [¶] (a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year. [¶] (b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or [¶] (c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees. [¶] A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214." (§ 82013.)

" 'Controlled committee' means a committee which is controlled

(continued)

the challenged administrative action, recognized the possible overbreadth of the statute, in the event it should be applied to *other than* a candidate or a committee controlled by him or her. "Committee" would cover even one person, unassociated with a particular candidate, who expended $1,000 for political purposes.

Respondent contends the above concerns are irrelevant, based on the general rule "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.]" (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610.) However, an exception has been carved out in the area of the First Amendment. "[T]he Court has altered its traditional rules of standing to permit — in the First Amendment area — 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' [Citation.]" (*Ibid.*)

As a consequence, "any enforcement of a statute thus placed at issue is totally forbidden until and unless a *limited construction or partial invalidation* so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." (*Id.* at p. 613.)

(fn. continued)
directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee." (§ 82016.)

Here, we employ just such a "limited construction or partial invalidation" for section 84305 to insure the narrow application of the section upheld in part III, ante, and to avoid a declaration of unconstitutionality based on overbreadth. "Committee," in relation to other sections of title 9, includes individuals, independent committees, and state measure proponent controlled committees (which cannot be forced to sacrifice their anonymity in order to air their views) as well as candidates and candidate controlled committees (which can). However, as to section 84305 only, "committee" must be interpreted to mean only the latter, a "candidate controlled committee"; therefore, only candidates and candidate controlled committees remain subject to the section. Such an interpretation conforms with the dictates of *Broadrick v. Oklahoma, supra*, 413 U.S. 601, 613.

Moreover, the Political Reform Act is to "be vigorously enforced" (§ 81002, subd. (f)), "should be liberally construed to accomplish its purposes" (§ 81003), and has a severability clause (§ 81015),[6] which " 'normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable.' " (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.)

Limiting the definition of "committee" within section 84305 to "candidate controlled committee" essentially invalidates inclusion of the other entities listed in the general definition, but *only as to section 84305*. The general definition remains applicable to all other sections of title 9. And we note that, although title 9 was the result of an initiative passed by the state electorate, that portion of section 84305 which we address today was not a part of the original

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[6] Section 81015 provides: "If any provision of this title, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this title to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, *shall not be affected thereby*, and to this end the provisions of this title are severable." (Emphasis added.)

measure, but was added by the Legislature. Section 84305 initially had no identification requirements.

" 'The final determination [of severability] depends upon whether the remainder . . . is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute . . . or constitutes a completely operative expression of the legislative intent . . . [and is not] so connected with the rest of the statute as to be inseparable.' [Citations.]" (*Calfarm Ins. Co. v. Deukmejian, supra*, 48 Cal.3d 805, 821.)

"The cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable." (*Ibid.*) The components of the word "committee" are mechanically and grammatically severable; their removal does not affect other provisions. (*Id.* at p. 822.) The major concern, candidate-dominated committees, remains subject to the statute; it is functionally separable, in that it is "capable of independent application." (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 331.) And the remaining portions of section 84305 "would likely have been adopted by the [Legislature] had [it] foreseen the invalidity" of including those excised entities coming under the definition of the generalized term "committee." (*Calfarm Ins. Co. v. Deukmejian, supra*, 48 Cal.3d 805, 822.) "There is no persuasive reason to suppose the [latter group] was so critical to the enactment of [section 84305] that the measure would not have been enacted in its absence." (*Ibid.*) And there remains the obvious: the Legislature has the power to repeal section 84305 in its entirety if it deems that action necessary.

Appellants argue that the requirement of sender identification on all mass mailings regardless of content is a further example of unconstitutional overbreadth. We disagree. Identification is necessary only for candidates and their controlled committees. A candidate voluntarily casts aside political anonymity when the decision to seek office is made. Because he or she aspires to govern, or in some manner make

binding decisions for, the electorate, that voting constituency is *entitled* to know what that candidate stands for and why. For all the reasons proffered in part III, *ante*, the "mass mailing" terminology is not unconstitutionally overbroad in the context of section 83405 as presently interpreted.[7]

We conclude Government Code section 84305 is constitutional as applied to Griset and his controlled committees. Its potential overbreadth is cured by the interpretation outlined above: Section 84305 applies only to candidates and candidate controlled committees.

Judgment affirmed. Parties to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

SONENSHINE, J.

I CONCUR:

MOORE, ACTING P. J.

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[7] We cannot conceive of a compelling *reason* for a candidate needing anonymity in a political mass mailing, paid for by his or her own zealously garnered campaign funds.

WALLIN, J., Dissenting.

In a virtually unparalleled feat of appellate legerdemain the majority manages to uphold a punitive fine of $10,000 imposed on a city council candidate for exercising his constitutional right to promote himself and criticize his election opponent. The candidate's "offense" is that he and his controlled committees sent political mailers to potential voters without including the name of the sender as required by an unconstitutional statute, though any reader can see the mailers were from his side. With remarkable Alice in Wonderland logic, the majority "supports" its conclusion by citing four cases — one from the United States Supreme Court, two from the California Supreme Court and one from the Court of Appeal — all of which concluded that statutory restrictions on anonymous handbills or pamphlets violated the First Amendment and were unconstitutional. Furthermore, the majority simply ignores well-reasoned decisions from several state supreme courts and a three-judge federal district court (declaring a New York statute unconstitutional) holding statutes similar to Government Code section 84305 unconstitutional. Because this opinion, if it survives, will have an extremely significant effect on the exercise of First Amendment rights in state and local election campaigns now underway, it is important to discuss the facts of this case.

To begin, political campaigns in southern California must be conducted primarily by mail. Candidates for Congress, and county and municipal offices cannot afford electronic media advertising and newspaper advertising is both expensive and ineffective. The electronic and print media focus almost exclusively on national and statewide races so there is very little free publicity. A less expensive tactic, the time-honored practice of walking door-to-door, has severe limitations. Even the most diligent campaigner can only meet a small number of voters because he or she must be careful to avoid interrupting dinner, Monday night football or a favorite sitcom. All walking must stop as darkness begins to fall. No one likes strangers who appear at the door after that time

and, sad to say, the streets in many areas are not safe for a lonely candidate. During the day most local candidates, and the voters they wish to meet, are employed away from home.

Candidates are also handicapped by low budgets and restrictive campaign finance laws which limit their ability to deliver their message. They are forced to resort to relatively inexpensive third class or "junk" mail to reach a large number of voters. Even then the political message must compete with a paper blizzard of advertising circulars from neighborhood supermarkets, hardware stores, realtors, insurance agents, doctors, dentists, and other merchants. Most recipients quickly cast the daily pile into the wastebasket. As a result effective campaign mailers must be strident and even outrageous as they attempt to catch the reader's eye. Bold colors, large type and shocking headlines are the rule rather than the exception. The tabloids at the supermarket checkout counter — and political mailers — would not be nearly as successful if they concentrated on intellectual discussions of economic theory and the effect of the balance of payments on the value of the dollar.

Griset's mailers are not nearly as offensive as many other circulars employed in elections in Orange County in recent years. Orange County's experience is not unique and our nation has a long tradition of rough and tumble electioneering. Political office is not for the faint-hearted.

As Presiding Justice Gardner wrote in *Desert Sun Publishing Co. v. Superior Court* (1979) 97 Cal.App.3d 49, 51-52, "In *New York Times v. Sullivan*, 376 U.S. 254 at page 270, the Supreme Court observed that this country has 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' [¶] This 'profound national commitment' encompasses the constitutionally protected right not only to make responsible, but also to make irresponsible charges against those in or seeking public office. It is an essential part of our

national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office. At such times the line between liberty and license blurs. However, our dedication to basic principles of liberty and freedom of expression will tolerate nothing less. The alternative is censorship and tyranny.[1] [¶] Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (Mad Tom), Henry Clay a pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy. [¶] Perhaps the low point in irresponsible political vilification occurred in the Cleveland-Blaine contest where an entire presidential campaign was waged on two deathless bits of doggerel based on allegations that Mr. Blaine was dishonest, and Mr. Cleveland had sired an illegitimate child — 'Blaine, Blaine, James G. Blaine, the continental liar from the State of Maine,' versus 'Ma, Ma, where's my Pa? Gone to the White House. Ha! Ha! Ha!'[2] [¶] Obviously, no rational person can approve any of the above. We merely note them as an

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[1] "We must not forget the infamous alien and sedition laws of 1798 under which a semiliterate revolutionary veteran named David Brown, who had criticized the Federalists as tyrants seeking to enslave the people, was kept in jail for two years, being unable to pay a fine of $400 and costs."

[2] "All of which prompted George W. Curtis of civil service reform fame to observe, 'We are told that Mr. Blaine has been delinquent in office but blameless in private life whereas Mr. Cleveland has been a model of official integrity, but culpable in his personal relations. We should therefore elect Mr. Cleveland to the public office which he is so well qualified to fill and remand Mr. Blaine to the private status which he is admirably fitted to adorn.' "

unpleasant fact of our political background — a history of rough, crude, brawling, mudslinging, muck-raking, name-calling attacks upon those in or seeking political office. In America, one who seeks or holds public office may not be thin of skin. One planning to engage in politics, American style, should remember the words credited to Harry S. Truman — 'If you can't stand the heat, get out of the kitchen.' "

According to a nationally syndicated column, Lincoln's famous opponent, Stephen A. Douglas, called him, "Ape . . . monster . . . ." and "a rawboned, shamble-gaited, bow-legged, knock-kneed, pigeon-toed, slob-sided, shapeless skeleton in a very tough, unwholesome skin." The president of Yale University once charged that Thomas "Jefferson's reelection 'would make our wives and daughters the victims of legalized prostitution.' " (Anderson & Binstein, *Washington Merry-Go-Round*, Metropolitan News-Enterprise (Sept. 14, 1992) p. 8.)

Against this backdrop the mailers under consideration here, which effusively praise Griset and harshly criticize his opponent are relatively tame. They primarily charge Griset's opponent with operating swap meets in the city leading to traffic problems and disputes over business licenses, parking and the cost to the city of extra police security. In one case the charges were made in a reproduced two-page letter to the president of the Santa Ana Police Benevolent Association signed by the officers and twelve board members of a neighborhood association. This and other mailers also claimed Griset's opponent had only recently moved into the city, did not vote in prior elections, was being sued by the city, and had been sued for fraud. One mailer praised Griset as a Santa Ana native and businessman, regular voter and law-abiding citizen. Any reader can see that the mailings come from Griset's campaign, even though they are not specifically identified in the manner required by Government Code section 84305. None of them are libelous. Nevertheless, the majority concludes Griset's controlled committees, and

Griset personally, must pay $10,000 to the Fair Political Practices Commission, an agency of the state, for sending them.

Such fines are a chilling prospect and will no doubt discourage many citizens from risking the hazards of an election campaign. How does the majority justify this intrusion into the political process? Amazingly, it decides that "attacks on an opponent may have their place in a contested race, but *anonymous* attacks *by a candidate* do not." (Maj. opn. p. 7.) The majority further states, "Distinguishing one's stand from that of an opponent is an important and proper method of informing the electorate about one's position as a candidate. It allows for open debate as well as questions from constituents. Anonymous jabbing at an opponent does not." (*Ibid.*) "Voters will likely be *better* informed with the limitations intact. We avoid political subterfuge; an office seeker cannot present one picture publicly, while anonymously pressing another in mass mailings." (Maj. opn. p. 9.) The majority fails to note that Government Code section 84305 is not limited to campaign attacks on an opponent. It applies to all political mailings, including those praising a candidate.

While the majority's comments are well meaning, nothing in the First Amendment or the case law suggests that any jurist or jurists have either the knowledge or the power to determine the best way to conduct political campaigns or inform the electorate. Candidates routinely orchestrate attacks on opponents through surrogates, leaks to friendly or gullible reporters and "not for attribution" criticisms. The same candidates then "take the high road" by denying responsibility. It happens all the time and all voters know it. Here Griset never denied responsibility but is nevertheless being fined for one mailer bearing the signatures of 14 Santa Ana residents and other mailers obviously sponsored by his campaign.

Four cases are cited to support the majority's conclusion that fining Griset for not more specifically identifying his

campaign mail is constitutional.[3] *All of them* held the particular statute or statutory application under consideration was unconstitutional.

In *Talley v. California* (1960) 362 U.S. 60, the only pronouncement from our nation's highest court on this issue, the court struck down a Los Angeles City ordinance requiring identification on all handbills. Talley was convicted of circulating handbills urging a boycott of businesses accused of denying equal employment opportunities to minorities. After declaring that regulations designed to limit obscenity and narrowly drawn ordinances designed to protect against fraud are proper, the Supreme Court issued a ringing declaration of the importance of the right to anonymity in political matters, explaining: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression . . . . [¶] Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the

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[3] The majority correctly rejects the FPPC's argument that the identification requirement on political mailings is necessary to provide an "audit trail" for campaign expenditure reporting. (Maj. opn. at p. 6, fn. 3.) Of course, as originally enacted, an audit trail appears to have been a primary reason for the identification requirement. Not even the majority suggests we should sacrifice political speech rights to make life easier for government accountants. In any event, there is no suggestion that Griset and his controlled committees failed to accurately report contributions and expenditures.

rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." (*Id.* at pp. 538-539, fns. omitted.)

Incredibly, despite the Supreme Court's plain pronouncement that anonymity is protected by, and essential to, the First Amendment, the majority uses *Talley* to support its conclusion anonymity is not protected.

Next the majority relies on *Canon v. Justice Court* (1964) 61 Cal.2d 446, which reversed a conviction for violating a similar, now repealed statute. The suggestion that the statute could be narrowly construed and therefore be constitutional was unanimously rejected. (*Id.* at pp. 460-461.) Nevertheless, the majority here purports to save Government Code section 84305 by rewriting it to apply only to candidates and their controlled committees. *Huntley v. Public Utilities Commission* (1968) 69 Cal.2d 67, also cited by the majority, held a requirement that recorded telephone messages contain the name and address of the sender violated the First Amendment.

Finally, the majority relies on *Schuster v. Municipal Court* (1980) 109 Cal.App.3d 887, the most recent California case to extensively consider the issue of the right to anonymity in election campaigns. There the court held Elections Code former section 29410, the predecessor to the

statute before us, was unconstitutional under the First Amendment. Section 29410 compelled "disclosure on the face of any writing 'having reference to an election, or any candidate, or to any measure' of the name and address of the individual 'responsible for it. . . .' [and prohibited] exempting only support statements such as 'Yes on,' 'Vote for' or . . . all anonymous literature which sets forth any arguments, information or ideas in support or in opposition to candidates for ballot measures." (*Id.* at p. 891.)

Schuster is virtually identical to this case and yet is given only slight mention by the majority. Elections Code section 29410 was defended as necessary to the election process for the same reasons used by the majority to uphold Government Code section 84305 and those reasons were specifically rejected in the *Schuster* opinion. "The Legislature here, in attempting to promote this governmental interest, declared: '(a) That a need exists for adequate identification of the source of campaign appeals directed at the voters in order to assist them in making rational decisions at the polls. [¶] (b) That by requiring such identification of campaign literature, the public is better able to evaluate the source of campaign material, may be more adequately informed, and can better distinguish between truth and falsity. [¶] (c) That by requiring identification, anonymous attacks, which cannot adequately be responded to in the heat of a campaign, will be discouraged. [¶] (d) That by requiring identification, a candidate who believes he has been libeled may more readily seek redress in a civil action for damages. [¶] (e) That limiting identification requirements to pejorative campaign material is inadequate because subtle attacks on candidates or measures can be framed which appear to be supportive but, in fact, are pejorative. . . .' (Stats. 1977, ch. 976, § 1, p. 2948.) [¶] However, these legislative findings cannot sustain the sweeping impact of the regulation on protected speech. [¶] Regarding source disclosure in order to assist the electorate in making rational decisions at the polls, this interest, although laudable, cannot justify in and of itself a blanket prohibition of all anonymous campaign literature. 'Of

course, the identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market" [citation]. Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible", what is valuable, and what is truth.' [Citation.]" (*Id.* at pp. 896-897.)

After pointing out that Elections Code section 29410 punished anonymous circulation of political literature even if it praised an opponent, *Schuster* recognized that its conclusion was "not singular or unique. Courts of other jurisdictions confronted with the identical issue have reached the same conclusion that a legislative prohibition of all anonymous campaign literature is unconstitutionally overbroad. (See *People v. Duryea* [(1974)] 351 N.Y.S.2d 978; *State v. North Dakota Ed. Ass'n* (N.D. 1978) 262 N.W.2d 731; *State v. Fulton* [(La. 1976)] 337 So.2d 866; *Commonwealth v. Dennis* (1975) 368 Mass. 92 [329 N.E.2d 706].) The holdings of these cases as well as ours should not be startling. We continue as a country of laws and not of persons because of the premise firmly embedded in our state and federal Constitutions that to stifle discussion is to menace the basic structure of our government. Section 29410 is unconstitutional because it encroaches upon this fundamental freedom." (*Id.* at p. 899, fn. omitted.)

Since *Schuster*, Louisiana has reaffirmed *State v. Fulton* (La. 1976) 337 So.2d 866 in *State v. Burgess* (La. 1989) 543 So.2d 1332. A three-judge federal court held a similar New York statute unconstitutional in *Zwickler v. Koota* (E.D.N.Y. 1968) 290 F.Supp. 244. Finally, the Illinois Supreme Court has joined the chorus of those willing to defend the First Amendment on these identical facts. (*People v. White* (1987) 116 Ill.2d 171 [506 N.E.2d 1284]).

The majority urges the disclosure requirement of section 84305 is essential to an informed electorate since the message cannot be properly evaluated unless the identity of the speaker is known, especially where the speaker is a candidate for public office. However, a brief review of the statute's history reveals it was enacted for an entirely different purpose.

Government Code section 84305 was enacted June 4, 1974, through the ballot initiative process as a part of title 9, the Political Reform Act. A cursory review of the California Voter's Pamphlet describing the act reveals two major purposes; the first, to minimize the influence of private campaign contributions on elected officials; the second to minimize the advantage enjoyed by incumbents. Article 3, of which Government Code section 84305 is a part, deals exclusively with contributions and expenditures. It defines contribution limits, reporting requirements, and prohibitions.

As originally enacted, Government Code section 84305 prohibited expenditures for postage for mass mailings unless paid for by meter for firstor third-class permit.[4] The meter or permit number was required to be identified in disclosure statements filed to reveal sources and amounts of campaign contributions and expenditures. Through records kept by the post office in the city of origin, the meter and permit number provided a way to identify the holder of the meter or permit and the dollar amount spent for postage. Thus, Government Code section 84305 was enacted to prevent undeclared contributions in the form of postage. It has been amended six times beginning in 1975 during which process the meter

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[4] The 1974 version of section 84305 read: "No person shall make an expenditure for the purpose of sending a mass mailing unless the postage is paid by postage meter or the mail is sent by first class or third class bulk rate. The bulk rate number or meter number shall be stated in a campaign statement, and a copy of every mass mailing in support of or in opposition to a state candidate or state measure shall be sent to the Commission. Such copies sent to the Commission shall be public records."

and permit number requirements were removed.[5] This process eviscerated the code as to its original purpose since the amounts paid for postage could not be determined with certainty after the 1975 amendment.

A parallel development was the enactment by the Legislature in 1977 of what became Elections Code section 29410, which punished as a misdemeanor the preparation and reproduction by all persons of all written material relating to elections, candidates, or ballot measures unless the name and address of the responsible party was printed on it. Amended in 1978, narrowing the field of guilty parties to those who reproduced and distributed such material, Elections Code section 29410 was later found to violate the First Amendment. (*Schuster v. Municipal Court, supra*, 109 Cal.App.3d 887.) The constitutionally offensive language was removed by amendment from Elections Code section 29410 in 1983, and replaced with a requirement that all candidates be provided with a copy of section 84305 of the Government Code.

Thus through legislative and judicial alchemy, a statute originally applying to all persons, enacted to disclose campaign contributions in the form of postage, has now been transformed by the majority into one barring the anonymous mailing of campaign literature by a candidate.

Obviously, of crucial importance to the First Amendment is the right to freedom of speech in political campaigns. Our

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[5] Amendments by the assembly in 1975 allowed the sender's name and address as an alternative to meter and permit number; in 1976, a post office box designation was allowed in stead of street address and a cross reference to Election Code section 11707 was added, excluding mass mailings in compliance with section 84305 from compliance with section 11707; in 1977, the cross reference to the Election Code was renumbered to section 29410; in 1978, permit, meter number, and filing requirements were deleted; in 1984, the reference to Election Code section 29410, which had been ruled unconstitutional, was removed. The most recent amendment in 1989 required that name and address be printed in contrasting ink.

nation's highest court and state supreme courts across the land have recognized that this protection includes the right to circulate anonymous literature concerning political candidates.

While paying lip service to the First Amendment, the majority narrows Government Code section 84305 so that it can only be applied to political candidates, the one group against whom its application is the most offensive. Today's decision may not have cut the heart out of the First Amendment, but it has surely been left bleeding.

WALLIN, J.

APPENDIX C

BEST AVAILABLE COPY

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FILED
SEP 19 1991
Gary L. Granville,
County Clerk
By _____ Deputy

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
and SANTA ANA PROGRESS COMMITTEE,
Plaintiffs and Petitioners,
vs.
FAIR POLITICAL PRACTICES COMMISSION,
Defendant and Respondent.

CASE NO. 638654
DIFFERENTIAL CASE MANAGEMENT PROGRAM
Judge Floyd H. Schenk, Dept. 70

ORDER DENYING PETITION FOR WRIT
OF ADMINISTRATIVE MANDAMUS (CCP § 1094.5)

The motion of Petitioners DANIEL GRISET, GRISET CAMPAIGN COMMITTEE and SANTA ANA PROGRESS COMMITTEE for a peremptory writ of mandate pursuant to

their First Cause of Action for administrative mandamus under Code of Civil Procedure § 1094.5, having been duly noticed by Petitioners for hearing and final determination by this court for August 8, 1991, came on regularly for hearing on that date, the Honorable Robert A. Knox, Judge, presiding. Reed & Davidson by Darryl R. Wold appeared for Petitioners. Jonathan S. Rothman, Counsel, Legal Division, appeared for Respondent FAIR POLITICAL PRACTICES COMMISSION.

Petitioners' motion having been heard and submitted for a final decision, and the court having ruled that the peremptory writ of mandate should be denied, and there being no further proceedings to be held on Petitioners' First Cause of Action for a writ of administrative mandamus,

IT IS ORDERED that:

(1) Petitioners' petition, in their First Cause of Action, for a peremptory writ of mandate is denied on the merits;

(2) This order is a final determination of Petitioners' First Cause of Action for administrative mandamus under Code of Civil Procedure § 1094.5, and no further proceedings are to be held on that cause of action; and

(3) Each party shall bear that party's own costs and attorneys fees incurred in connection with Petitioners' First Cause of Action.

Dated: September 19, 1991.

ROBERT A. KNOX
JUDGE

APPENDIX D

BEST AVAILABLE COPY

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

MINUTE ORDER

Department 70
Court convened at N/A A.M. August 28 1991, present Hon. Robert A. Knox, Judge; Janet Lee Deputy Clerk; None, Deputy Marshal; None Reporter; and the following proceedings were had:

63 86 54
GRISET ET AL VS FAIR POLITICAL PRACTICE COMMISSION

RE: Plaintiffs' Motion for Peremptory Writ of Mandate, Summary Adjudication Causes of Action and Summary Judgment

No appearances. The above matter having been taken under submission August 8, 1991, the Court now rules as follows:

The question of the constitutionality of Government Code Section 83405 [*sic*. Should be 84305 throughout.] was previously raised in plaintiffs' motion for injunctive relief. Judge Eileen C. Moore in her minute order dated December 10, 1990 ruled as follows:

"Government Code Section 83405 appears to inhibit unconstitutionally the free expression of ideas by committees, as the term "committee" is defined in Government Code Section 82013(b) and (c) in that members of the public who make political contributions may be robbed of their anonymity in expressing opinions. As such, such contributors may be discouraged from expressing opinions about unpopular subject matters.

"However, the instant case does not involve committees as defined by Government Code Section 82013, but involves

'controlled committees' as defined by Government Code Section 82016.

"Although the plaintiffs argue that they should also be afforded this same constitutional protection by being allowed to express anonymous opinions, they have provided insufficient authority for this concept. It is clearly of compelling state interest that the public be fully informed about the political opinions of political candidates.

"Government Code Sections 81002 and 81003 clearly state that the Elections Reform Act should be vigorously enforced and liberally construed.

"In addition the Elections Reform Act contains a severability clause in the Government Code Section 81015. That statute states:

> If any provision of this title, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this title to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this title[. . . .]

"Since there has been no unconstitutional inhibition upon freedom of expression to the plaintiffs in the present situation, this Court holds that Government Code Section 83405 is validly imposed upon the actions of these plaintiffs even though there is a possibility that under some circumstances this statute could be unconstitutionally overbroad.

"Therefore, plaintiffs have not made a showing that they will prevail on the merits. The request for a preliminary injuction is DENIED."

This Court agrees that section 83405 does unconstitutionally inhibit the free expression of ideas by committees as the term "committee" is defined in Government Code Section 82013(b) and (c) in that individuals fitting that definition who make political contributions would be required to give

up their anonymity in expressing opinions. Such a result could have a chilling effect on the willingness of such contributors to support unpopular causes.

Considering section 83405 as a whole and in accordance with its plain meaning the Court would further construe subsection (a) to apply to "candidate, committee or *controlled committee*".

As pointed out by Judge Moore, the election Reform Act does contain a severability clause in Government Code Section 81015 which permits the severance of any invalid portion of a provision under the Act. Thus, although agreeing essentially with Judge Moore's analysis and ruling, this Court would take the matter one step further and specifically sever and delete the term "committee" from subsections (a) and (b), leaving the statute applicable to "candidate or controlled committee".

The Court concludes that the state clearly has a compelling interest to the end that the public be fully informed which outweighs any interest candidates and controlled committees have in expressing anonymous opinions and therefore rules that Government Code Section 83405 as construed is constitutional. Moving party to give notice.

ENTERED: 8-28-91

APPENDIX E

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BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of:

DANIEL GRISET, GRISET CAMPAIGN COMMITTEE and the SANTA ANA PROGRESS COMMITTEE,

Respondent.

FPPC No. 88/442
L-49909

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Fair Political Practices Commission as its Decision in the above-entitled matter.

This Decision shall become effective on March 27, 1991.

IT IS SO ORDERED February 15, 1991.

BY /s/
Chairman, or a duly appointed
representative, of the
Fair Political Practices Commission

btm

BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of:

DANIEL GRISET, GRISET CAMPAIGN COMMITTEE and the SANTA ANA PROGRESS COMMITTEE,

Respondent.

FPPC No. 88/442
L-49909

PROPOSED DECISION

This matter came on regularly for hearing before Jerry Mitchell, Administrative Law Judge of the Office of Administrative Hearings, on December 13, 1990, at Los Angeles, California. Complainant was represented by Janis Shank McLean, staff counsel. Respondent Daniel Griset was not present. He and the respondent committees appeared by counsel, Darryl R. Wold, attorney at law.

No evidence was offered and the record was closed after the parties stipulated, on the record, by and through their respective counsel, that the following facts be found to have been proved and that the issues be determined and the order made as set forth below. Pursuant to said stipulation, the facts are found as follows:

FINDINGS OF FACT

I

The accusation was made by Gregory W. Baugher in his official capacity as Executive Director of the Fair Political Practices Commission of the State of California.

II

In 1988, respondent Daniel Griset was an incumbent candidate for the City Council of the City of Santa Ana, California and, on November 8, 1988, he was reelected.

III

At all times mentioned herein, respondents Griset Campaign Committee and the Santa Ana Progress Committee were committees controlled by respondent Daniel Griset.

IV

On or about October 11, 1988, respondent Griset Campaign Committee sent a mass mailing, containing a letter on the letterhead of the Washington Square Neighborhood Association.

V

The mailing referred to in Finding IV was paid for by respondent Griset Campaign Committee, and approximately three hundred (300) identical, or nearly identical, pieces were sent in a calendar month.

VI

The mailing referred to in Findings IV and V did not identify the name and address of respondent Griset Campaign Committee, and the name of the controlling candidate, respondent Daniel Griset, on the outside of each piece of mail.

VII

On or about October 14, 1988, the respondent Santa Ana Progress Committee sent a mass mailing attacking respondent Daniel Griset's opponent, Rick Norton. The mailing was entitled "Meet the Real Rick Norton."

VIII

The mailing referred to in Finding VII was paid for by the respondent Santa Ana Progress Committee, and approximately twenty-nine thousand (29,000) identical, or nearly identical, pieces were sent in a calendar month.

IX

The mailing referred to in Findings VII and VIII identified the name and address of the Santa Ana Progress Committee, but did not identify the name of the controlling cadidate, [*sic*] respondent Daniel Griset, on the outside of each piece of mail.

X

On or about October 24, 1988, the respondent Santa Ana Progress Committee sent a mass mailing attacking respondent Daniel Griset's opponent, Rick Norton, and supporting respondent Daniel Griset. The mailing was entitled "Swap Meet."

XI

The mailing referred to in Finding X was paid for by the respondent Santa Ana Progress Committee, and approximately twenty-nine thousand (29,000) identical, or nearly, identical pieces were sent in a calendar month.

XII

The mailing referred to in Findings X and XI identified the name and address of the Santa Ana Progress Committee,

but did not identify the name of the controlling candidate, respondent Daniel Griset, on the outside of each piece of mail.

XIII

On or about November 2, 1988, the respondent Santa Ana Progress Committee sent a mass mailing attacking respondent Daniel Griset's opponent, Rick Norton, and supporting respondent Daniel Griset. The mailing was entitled "7 Lies."

XIV

The mailing referred to in Finding XIII was paid for by the respondent Santa Ana Progress Committee, and approximately twenty-nine thousand (29,000) identical, or nearly identical, pieces were sent in a calendar month.

XV

The mailing referred to in Findings XIII and XIV identified the name and address of the Santa Ana Progress Committee, but did not identify the name of the controlling candidate, respondent Daniel Griset, on the outside of each piece of mail.

XVI

On or about November 3, 1988, the respondent Santa Ana Progress Committee sent a mass mailing attacking respondent Daniel Griset's opponent, Rick Norton. The mailing was entitled "Beware of Tricksters."

XVII

The mailing referred to in Finding XVI was paid for by the respondent Santa Ana Progress Committee, and approximately twenty-nine thousand (29,000) identical, or nearly identical, pieces were sent in a calendar month.

XVIII

The mailing referred to in Findings XVI and XVII identified the name and address of the Santa Ana Progress Committee, but did not identify the name of the controlling candidate, respondent Daniel Griset, on the outside of each piece of mail.

* * * * *

Pursuant to the stipulation of the parties, the following determination of issues is hereby made:

DETERMINATION OF ISSUES

I

Cause exists, pursuant to Section 83116 of the Government Code, to require that respondents Daniel Griset and Griset Campaign Committee, together, pay a monetary penalty of two thousand dollars ($2,000.00) for the violation of Section 84305 of said Code set forth in Findings IV, V and VI.

II

Cause exists, pursuant to Section 83116 of the Government Code, to require that respondents Daniel Griset and the Santa Ana Progress Committee, together, pay a monetary penalty of two thousand dollars ($2,000.00) for each of the four violations of Section 84305 of said Code set forth in Findings VII through XVIII, inclusive.

* * * * *

Pursuant to the stipulation of the parties, the following order is hereby made:

ORDER

I

Respondents Daniel Griset and Griset Campaign Committee shall pay a monetary penalty of $2,000.00, for which respondents Daniel Griset and Griset Campaign Committee shall be jointly and severally liable.

II

Respondents Daniel Griset and the Santa Ana Progress Committee shall pay a monetary penalty of $8,000.00, for which respondents Daniel Griset and the Santa Ana Progress Committee shall be jointly and severally liable.

DATED: Dec. 26, 1990

/s/ JERRY MITCHELL
JERRY MITCHELL
Administrative Law Judge
Office of Administrative Hearings

JM:btm

APPENDIX F

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CALIFORNIA GOVERNMENT CODE

§ 82007. Candidate.

"Candidate" means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. "Candidate" also includes any officeholder who is the subject of a recall election. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. "Candidate" does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971.

§ 82013. Committee.

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year.

(b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees.

A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

§ 82016. Controlled Committee.

"Controlled committee" means a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

§ 82041.5. Mass Mailing.

"Mass mailing" means over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry.

Supreme Court, U.S.
FILED
MAR 28 1995

No. 94-1456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,

Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN G. CHURCHWELL
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QUESTION PRESENTED

Whether a statute that prohibits anonymous mass mailings by candidates violates the First Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

LIST OF APPENDICES v

I. STATEMENT OF THE CASE 2

II. REASONS FOR DENYING THE PETITION 4

A. Section 84305 is Narrowly Tailored 5

B. Not One of the "Questions Presented" in the Petition Was Addressed By the Court Below 5

C. The Procedural Posture and Factual Record of the Present Case Hinder a Broader Review of Section 84305 7

D. The *McIntyre* Case Presents the First Amendment Issues Associated with Speaker Identification Laws 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page(s)

Anderson v. Celebrezze, 460 U.S. 780 (1983) 9

Bemis Pentecostal Church v. State, 731 S.W.2d 897 (Tenn. 1987) 9

Buckley v. Valeo, 424 U.S. 1 (1976) 8

Griset v. Fair Political Practices Comm'n, 884 P. 2d 116 (Cal. 1994) 6, 7

Illinois v. Gates, 462 U.S. 213 (1983) 7

KVUE, Inc. v. Moore, 709 F.2d 922 (5th Cir. 1983), aff'd 465 U.S. 1092 (1984) 9

McIntyre v. Ohio Elections Commission, 618 N.E.2d 152 (Ohio 1993), *cert. granted* 114 S.Ct. 1047 (1994) . . .8, 9

Youakim v. Miller, 425 U.S. 231 (1976) 6

TABLE OF AUTHORITIES cont'd

Cases

Page(s)

State Statutes

California Government Code

§ 1094.5 (b) 7
§ 82007 . . . . . .5, 8
§ 82013 . . . . . .5, 8
§ 82041.5 . . . . . .2, 5
§ 84305 . . . . . .passim

2 California Code of Regulations
§ 18435(a) 2

Arizona Revised Statutes
§ 16-912 5

Massachussetts General Laws
ch. 56, § 39 5

Miscellaneous

Sup. Ct. R. 14.1(a) 6

LIST OF APPENDICES

Page

APPENDIX A A.1

APPENDIX B B.1

No. 94-1456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,

Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Fair Political Practices Commission respectfully requests that the Court deny the petition for a writ of certiorari filed by Daniel Griset, Griset Campaign Committee, and Santa Ana Progress Committee ("Petitioners"). The California statute is constitutional, the three issues raised by Petitioners were not addressed by the California Supreme Court, and every important constitutional issue associated with election-related speaker identification statutes is already before the Court in *McIntyre v. Ohio Elections Commission* (No. 93-986).

I.
STATEMENT OF THE CASE

Petitioner Daniel Griset was an incumbent local councilmember in Santa Ana, California, running for reelection in 1988. In the month before the election, Petitioners Griset and campaign committees controlled by him, the Santa Ana Progress Committee and the Griset Campaign Committee, sent five separate mass mailings[1] that failed to identify candidate Griset as the true sender in accordance with the requirements of California Government Code Section 84305.[2]

Four of the five "smear" or "hit" pieces were produced and sent by a commercial direct mail firm at the direction of Petitioners. These four mailings, entitled "Meet the Real Rick Norton," "Swap Meet," "The Seven Lies Swap Meet Owner Rick Norton Wants You to Believe," and "Beware of Tricksters," each identified the Santa Ana Progress Committee as the sender, but failed to include the required reference to controlling candidate Daniel Griset. Each of the four mass mailings was mailed to 29,000 households in the City of Santa Ana.

The fifth mailer was produced and sent by the Griset Campaign Committee and targeted approximately 300 police officers who worked for the City of Santa Ana. This piece listed

---

[1] A "'mass mailing' has been made when over two hundred substantially similar pieces of mail have been sent within a calendar month." 2 Cal. Code Regs. § 18435(a). Excluded are form letters and other mail sent in response to an unsolicited request, letter, or other inquiry. Cal. Gov't Code § 82041.5 (set forth in Petitioner's Appendix F, page 2).

[2] The regulation that implements Section 84305 (2 Cal. Code Regs. § 18435) is reprinted in Appendix B.

the sender as the "Washington Square Neighborhood Association," when in fact it was Griset.

In March 1990, Respondent filed an administrative enforcement proceeding against Petitioners. It alleged that Petitioners had violated Section 84305 by failing to identify candidate Daniel Griset on the envelope return address as the sender. Petitioners sought to enjoin the enforcement of Section 84305 against them on constitutional grounds in Orange County Superior Court in an action for declaratory and injunctive relief. The trial court denied Petitioners' motion for a preliminary injunction, and the administrative enforcement action proceeded to hearing before an administrative law judge. Upon stipulated facts, the administrative law judge found that Petitioners had committed five separate violations of Section 84305. He then imposed a fine of two thousand dollars ($2,000) per violation.

Petitioners thereafter amended their action in Orange County Superior Court to add a cause of action for a writ of administrative mandamus, arguing that the application of Section 84305 to them was unconstitutional under the First and Fourteenth Amendments. Petitioners then filed simultaneous motions for: (1) issuance of a peremptory writ on the mandamus cause of action; and (2) summary judgment on the declaratory and injunctive relief counts. The trial court issued separate orders denying the petition for a writ of mandate and denying the motion for summary judgment. Petitioners appealed only from the denial of the writ of administrative mandamus.

The California Court of Appeal upheld the trial court's denial of the writ, holding that Section 84305 was constitutionally valid as applied to Petitioners. The court also examined Section 84305 for overbreadth in its application to non-candidate controlled committees, and found that its application to such committees

was constitutionally invalid. The court then placed a limiting construction on Section 84305 to save the statute from the perceived infirmity.

The California Supreme Court, in a 7-0 opinion, held that Section 84305 is not unconstitutional as applied to candidates and their controlled committees, including Petitioners. It did not reach any other issue.

II.
REASONS FOR DENYING THE PETITION

Election-related speaker identification statutes serve the important governmental purpose of providing voters with critical information before they vote. These laws potentially implicate the First Amendment rights of free speech and association, however, because some speakers may wish to remain anonymous.

It would be impracticable for the Court to review, for constitutional infirmity, the statutes of each of the forty-nine states[3] that regulate in this area. Thus, the question is whether the present case qualifies for the Court's discretionary review, given: (1) the unique language of the California statute, (2) the narrow scope of the California Supreme Court's unanimous decision, and (3) the case's procedural posture. When these criteria are examined, against a backdrop of speaker identification issues that may warrant review by the Court, it is obvious that the Court should deny the present petition.

---

[3] Appendix "A" cites the laws of the states that have speaker identification requirements for elections. The statutory provisions of the federal government and the District of Columbia also are listed.

A.
Section 84305 is Narrowly Tailored

The California statute (Cal. Gov't Code § 84305) is not a representative speaker identification statute. In fact, it is the most narrowly-tailored such law in the nation. It regulates only candidates and political committees.[4] Second, it regulates not all speech, but only the mass mailings of such candidates and committees.[5] Third, it is content neutral, allowing the electorate to know who sponsors a mailing, irrespective of whether it contains malicious lies, innuendo, or the truth. Finally, the required disclosure is simply the name and address of the candidate or committee, which is public information as soon as the candidate files for the office, or the committee files its first campaign statement.

B.
Not One of the "Questions Presented" in the Petition Was Addressed By the Court Below

None of the three, broad issues that Petitioners are asking the Court to accept for review was examined by the California

---

[4] Cal. Gov't Code §§ 82007, 82013 (set forth in Petitioner's Appendix F, page 1.) Arizona's sender identification law also is limited in scope to candidates and political committees, but the law applies to all "campaign literature or advertisements" that contain solicitations or express advocacy. (Ariz. Rev. Stat. Ann. § 16-912 (West Supp. 1994).)

[5] Cal. Gov't Code § 82041.5 (set forth in Petitioner's Appendix F, page 2). Massachusetts regulates only election-related advertisements in newspapers and other periodicals, but it applies to all "person[s]." (Mass. Gen. Laws Ann. ch. 56, § 39 (Law. Co-0p. 1990).)

Supreme Court. Ordinarily, this Court does not decide questions not dealt with by the lower court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). In the decision below, the unanimous California Supreme Court stated that the:

> "[P]recise question that confronts us [is] whether a statute that prohibits anonymous mass mailings by candidates or candidate-controlled committees in political campaigns violates the First Amendment ...." *Griset v. Fair Political Practices Comm'n*, 884 P. 2d 116, 119 (Cal. 1994).

Astonishingly, this issue is not even listed by Petitioners in the "Questions Presented" Section of their petition, and apparently, Petitioners have waived it. Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court").[6]

Petitioners have abandoned the mundane issue whether the administrative fine levied against them was legal, for the bright lights of a constitutional facial challenge. Petitioners ask the Court to do the following: (1) review the facial validity of Section 84305; (2) *if* the Court decides that Section 84305 is unconstitutional as applied to parties not before the Court (non-candidates), *then* to decide whether it is constitutional as applied to candidates; and (3) *if* the Court rules on the first part of Question Number 2 pertaining to parties not before the Court, *then* to review Section 84305 for any overbreadth problems.

---

[6] Although the second issue presented by Petitioners contains a reference to an "as applied" challenge with regard to candidates, it is conditional upon the court first reaching issues concerning non-candidates. We believe that this does not meet the "fairly included" test.

These issues were not considered by the California Supreme Court. It simply found that Section 84305 was constitutional as applied to Petitioners and other candidates and candidate-controlled committees. This Court's inquiry should be no broader.

C.
The Procedural Posture and Factual Record of the Present Case Hinder A Broader Review of Section 84305

Petitioners chose not to appeal the trial court's judgment denying their declaratory relief cause of action, choosing instead to rely entirely on their appeal of the trial court's denial of their petition for a writ of administrative mandamus. Under California law, administrative mandamus limits judicial review to a limited number of specified issues. Cal. Code Civ. Proc. § 1094.5(b) (West Supp. 1995).

The California Supreme Court, noting that Petitioners' appeal was limited to the denial of the writ petition, did not reach Petitioners' overbreadth claims. *Griset v. Fair Political Practices Comm'n,* 884 P. 2d at 118. This Court also should reject Petitioners' facial challenge to Section 84305. Jurisdictional and prudential considerations weigh heavily against granting certiorari when the claim upon which the petition is based relies entirely on a law's theoretical impact on parties not before the court. *See generally Illinois v. Gates*, 462 U.S. 213, 217-225 (1983) (granting certiorari only when issue was decided by the state court of last resort guarantees adequate factual record, and discourages the framing of broad rules, seemingly sensible on one set of facts, but which prove ill-considered in other circumstances).

D.
The McIntyre Case Presents the First Amendment Issues Associated With Speaker Identification Laws

There are three issues that arguably could form the basis for certiorari in a lawsuit involving an election-related speaker identification statute. First, the Court could examine the scope of the right to anonymity in the context of elections. As stated above, Section 84305 is the most narrowly-tailored such law in the country. Unless this Court is of the opinion that *no* such law is valid, no matter how narrowly drawn, the California statute passes constitutional muster under the strict scrutiny test. In the unlikely event that the Court feels that the right to anonymity is absolute, such a sweeping pronouncement can be made in *McIntyre v. Ohio Elections Commission*, 618 N.E.2d 152 (Ohio 1993), *cert. granted* 114 S.Ct. 1047 (1994). It would seem inefficacious to review the California case merely to proclaim such an unequivocal holding twice in the same term.

A related issue is whether some type of monetary or other threshold is required before a state may mandate that a person identify himself or herself in connection with an election-related communication. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). California has such thresholds, because the "sender" must already be a candidate or political committee[7] in order to be

---

[7] Both "recipient" and "independent expenditure" committees currently have a qualifications threshold of $1,000 per calendar year, while a "major donor" committee has a threshold of $10,000 per calendar year. A "candidate" is defined by the act of running for office and receiving or spending any amount of money for that purpose. The California statutory definitions of these terms (Cal. Gov't Code §§ 82007, 82013) are set forth in Appendix F, page 1 of the Petition.

subject to the law. Many other states have chosen to regulate a broader class of speakers. Once again, the Court can address this issue in *McIntyre* without any need to accept another case.

Finally, there may be some question as to the proper standard of review in these cases. It certainly is *not* an issue in the instant case, as both parties agree that strict scrutiny is applicable and that is the test that the unanimous California Supreme Court applied. Moreover, almost every court reviewing a speaker identification statute has applied strict scrutiny.[8] A notable exception is the majority opinion of the Ohio Supreme Court in *McIntyre,* which applied the relaxed "legitimate state interest" test. *McIntyre v. Ohio Elections Commission*, 618 N.E.2d at 155-56. The *McIntyre* decision of this Court should settle the standard of review issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 27, 1995

Respectfully submitted,

STEVEN G. CHURCHWELL
Counsel of Record
DANIEL E. MUALLEM
Attorneys for Respondents

---

[8] *See, e.g., Bemis Pentecostal Church v. State,* 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed,* 485 U.S. 930 (1988); *cf. KVUE, Inc. v. Moore,* 709 F.2d 922, 937 (5th Cir. 1983), aff'd 465 U.S. 1092 (1984) (applying balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

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W.VA. CODE § 3-8-12 (1994)
WIS. STAT. ANN. § 11.30 (West Supp.1994)
WYO. STAT. § 22-25-110 (1992)

2 U.S.C. § 441d (1985).

APPENDIX B

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B.1

(Regulations of the Fair Political Practices Commission, Title 2, Division 6 of the California Code of Regulations)

18435. Definition of Mass Mailing and Sender

(a) A "mass mailing" has been made when over two hundred substantially similar pieces of mail have been sent within a calendar month.

(b) The sender, as used in Government Code Section 84305, is the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing which are reportable under Government Code Sections 84200-84217.

(c) For purposes of this section to "pay for" a share of the cost of a mass mailing means to make, to promise to make, or to incur an obligation to make, any payment:

(1) To any person for the design, printing, postage, materials or other costs (including salaries, fees, or commissions) of the mailing; or

(2) As a fee or other consideration for an endorsement or, in the case of a ballot measure, support of opposition, in the mailing.

(3)

FILED
MAR 29 1995

No. 94-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,
Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

BRIEF OF THE CALIFORNIA POLITICAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF REASONS TO GRANT REVIEW	2
ARGUMENT	7
I. CALIFORNIA'S REQUIREMENT FOR SPEAKER IDENTIFICATION IN POLITICAL SPEECH IS UNCONSTITUTIONAL ON ITS FACE	7
A. California's Statute Illustrates the Complexity to Which Political Speaker Identification Mandates Are Prone, and Their Resulting Burdens on Speech	7
II. CALIFORNIA'S SPEAKER IDENTIFICATION STATUTE IS UNCONSTITUTIONALLY OVERBROAD IN ITS APPLICATION TO PROTECTED POLITICAL SPEECH	15
A. California's Statute Compels Speech that Impermissibly Burdens the Speaker's Message, Further Infringing on the First Amendment Freedoms of Political Speakers	15
B. No Sufficiently Compelling State Interest Has Been Advanced to Justify Compelled Speaker Identification in Political Speech	18
C. Speaker Identification Statutes Which Are Inherently Overboard Cannot Realistically Be Narrowly Tailored to Cover Only Speech that May Be Regulated	19
CONCLUSION	20
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES — Page

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 6
Buckley v. Valeo, 424 U.S. 1 (1976) 17, 18
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 16, 17, 18
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 15
Griset v. Fair Political Practices Commission, 8 Cal. 4th 851 (1994) ..... *passim*
McIntyre v. Ohio Elections Commission, 67 Ohio St. 3d 391 (1993), *cert. granted*, 114 S.Ct. 1047 (1994) (No. 93-986) 1, 2, 3, 4, 15
Riley v. National Federation of the Blind of N.C., 487 U.S. 781 (1988) 15, 16, 17, 18
Schuster v. Municipal Court, 109 Cal.App. 3d 887 (1980) 2, 9
Talley v. California, 362 U.S. 60 (1960) 2, 4, 7, 20
U.S. v. National Treasury Employees Union, —— U.S. —— (1995) (1995 W.L. 68442) 5, 6

STATE STATUTES

California Elections Code § 3502 11
California Elections Code § 29410 ..... 2, 9
California Government Code, Title 9, Chapters 1 through 11, §§ 81000-91015 8
California Government Code § 82007 ..... 9, 11
California Government Code § 82013 9
California Government Code § 82016 11
California Government Code § 82041.5 10
California Government Code § 82047.6 11
California Government Code § 82048.7 13
California Government Code § 82051 11
California Government Code § 83112 8
California Government Code § 83115 ..... 3, 9
California Government Code § 83116.5 ..... 3, 9
California Government Code § 83116(c) 3
California Government Code § 84102 12
California Government Code § 84106 12
California Government Code § 84107 12

TABLE OF AUTHORITIES—Continued

	Page
California Government Code §§ 84200-84219	17
California Government Code § 84200.5	17
California Government Code § 84200.7	17
California Government Code § 84200.8	17
California Government Code § 84203	17
California Government Code § 84203.5	17
California Government Code § 84211	17
California Government Code § 84305	*passim*
California Government Code § 89510	3, 4
California Government Code § 91000	9
California Penal Code § 19	9
California Rules of Court, Rule 976(d)	5
STATE REGULATIONS	
California Code of Regulations, Title 2, Division 6, §§ 18109-18954	9
Fair Political Practices Commission Regulation § 18435	10, 12, 13
Fair Political Practices Commission Regulation § 18585	11
STATE CONSTITUTIONAL PROVISIONS	
Cal. Const., Art. III, sec. 3.5	5
MISCELLANEOUS	
In the Matter of Riverside Tomorrow—Riverside Landowners & Arlington Heights Landowners Association Committee (Fair Political Practices Commission No. 88/239, 1990-1992 CEB FPPC Enforcement Decisions 731)	13
In the Matter of Alliance for Mission Viejo—Yes on Measure A, Yes on Recall (Fair Political Practices Commission No. 90/163, 1990-1992 CEB FPPC Enforcement Decisions 183)	12
In the Matter of Barbara Riordan and "Barbara Riordan for Supervisor Committee" (Fair Political Practices Commission No. 88/583, 1987-1989 CEB FPPC Enforcement Decisions 881)	12

TABLE OF AUTHORITIES—Continued

Page

In the Matter of Assemblyman Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy (Fair Political Practices Commission No. FC-86/512, 1987-1989 CEB FPCC Enforcement Decisions 123) 3, 10

In the Matter of California Judges Association—Committee for Public Responsibility (Fair Political Practices Commission No. 89/186, 1990-1992 CEB FPPC Enforcement Decisions 27) 14

In the Matter of Carmen Sabatino (Fair Political Practices Commission No. 90/369, 1993-1995 CEB FPPC Enforcement Decisions 31) 10

Fair Political Practices Commission—*Olson* Advice Letter, FPPC No. A-89-304 (June 19, 1989) 19

BRIEF OF THE CALIFORNIA POLITICAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The California Political Attorneys Association ("CPAA"), a bipartisan association of more than eighty-five California attorneys who practice campaign, elections, and political law, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

CPAA's membership represents and advises hundreds of clients—Republicans, Democrats, and independents; incumbents and challengers; ballot measure committees which support or oppose initiatives and referenda at the state and local levels; political action committees of associations, corporations, and labor organizations; individual and business entity donors; and grass roots organizations of all stripes.

Most of these individuals and organizations must comply with—and often rely upon CPAA members to advise them with respect to compliance with—California's speaker identification requirements for political mass mailings. While speaker identification requirements might be viewed as full employment acts for political attorneys, CPAA files this brief because the extensive experience of its members with enforcement of the California requirements has shown them to have an unduly burdensome effect on political expression in California.

Individual CPAA members have represented clients in numerous enforcement proceedings brought by the California state agency which is responsible for interpretation and enforcement of these compelled speech requirements. The CPAA itself has appeared as an *amicus curiae* in this case before the California Supreme Court, challenging the constitutionality of the California requirements. *Griset v. Fair Political Practices Commission*, 8 Cal.4th 851 (1994). The CPAA also has filed briefs *amicus curiae* before this court in *McIntyre v. Ohio Elections Commission*, 67

Ohio St.3d 391 (1993), *cert. granted,* 114 S.Ct. 1047 (1994) (No. 93-386), and in several California appellate court proceedings, to provide the courts with the insight of those who have represented a wide range of clients in matters involving various California and national political regulations.

SUMMARY OF REASONS TO GRANT REVIEW

California's identification requirement for political speakers shows how complex and burdensome such requirements can become. The statute (California Government Code Section 84305) and its implementing regulations are so difficult to understand that political speakers act at their peril if they seek to speak without first retaining specialized legal counsel. In numerous administrative enforcement actions under the California statute, unsophisticated participants in electoral campaigns have been penalized heavily for indavertent violations in which anonymity was not even an issue. More sophisticated candidates and campaign committees have also been penalized under circumstances where the public was fully informed of the identity of those involved.

The statute under review by this court in *McIntyre v. Ohio Elections Commission, supra,* may be described as a "first generation" speaker identification statute. The California statute upheld by the California Supreme Court in *Griset,* presents the "next generation" of speaker identification requirements—requirements that are highly content-oriented.[1] The technical complexity of compliance, coupled with the penalties for very minimal violations, have a chilling effect on political speech.

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[1] California's own version of a "first generation" speaker identification statute (former California Elections Code Section 29410) was held unconstitutional in 1980 in *Schuster v. Municipal Court,* 109 Cal.App.3d 887 (1980). *See* fn. 8, *infra. Schuster* followed by 20 years this Court's earlier striking down of another California speaker identification statute in *Talley v. California,* 362 U.S. 60 (1960).

The Ohio statute in *McIntyre* prohibited speaker communication without identification. The California statute in this case not only prohibits such communication without identification, but also contains exactingly-detailed content and placement requirements, including the requirement that a speaker identify and characterize its own affiliations. Unlike the limited enforcement authority of the Ohio Elections Commission in *McIntyre*, the California enforcement agency, the Fair Political Practices Commission ("FPPC"), has wide latitude to scrutinize, and disapprove, a speaker's characterization of its own affiliations. The FPPC may impose significant fines and penalties, far higher than those Ohio imposed in the statute reviewed in *McIntyre*.[2]

The California speaker identification statute is overbroad. In addition to candidates in their own political mailings, individuals or groups who qualify as "committees" because they sometimes support or oppose candidates or ballot measures must also identify themselves on any mailings of more than 200 identical or nearly identical pieces of literature sent through the mail. This requirement applies to mailings whether or not a particular mailing "expressly advocates" the election or defeat of a candidate or measure, is a fundraising mailing, or is mailed for some other lawful purpose by the individual or committee.[3]

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[2] The FPPC is authorized to prosecute violations of the Political Reform Act by §§ 83115 through 83116.5 of the Government Code. Violations are punishable by monetary penalties of up to $2,000. The FPPC assesses such penalties on a per-violation basis, without regard to fault. § 83116(c). The FPPC's administrative enforcement decisions are published by California Continuing Education of the Bar, cited in this brief as [year] CEB FPPC Enforcement Decisions [page].

[3] California Government Code section 89510 permits a committee to spend funds for activities, including mailings, which are "reasonably related to a governmental, legislative, or political purpose." In an FPPC enforcement action, *In the Matter of Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy* (Fair Political Practices Commission No. FC-86/512, 1987-1989 CEB FPPC Enforcement Decisions 123), discussed *infra*, a fund-

Moreover, the ancillary statutes which comprise the statutory identification scheme require the speaker to identify and disclose its sponsors or affiliations. The statute also requires that the identification appear *on the outside,* and for some mailings *also on the inside* of the mailing, in defined type size and with specific legibility and color contrast mandates.

Failure to comply precisely with each of these requirements, and to use the precise name of the group or committee which sends the mailing, has resulted in significant fines and penalties—far higher than any that could be imposed by Ohio in the statute under review in *McIntyre.* The FPPC has imposed such fines on the least sophisticated groups in the political process. The FPPC has held in some of its enforcement actions that the violator's failure to correctly and exactingly identify the speaker, or its affiliations, on the *outside* of the mailing may have caused the recipients of the mailing to open "an unwanted communication."

CPAA's experience with the California statute underscores the constitutional infirmity of prohibitions on anonymity in political speech and the overbreadth of such speaker identification requirements. As this Court held in *Talley v. State of California, supra,* anonymous literature has long played an important role as a vehicle for the expression of political views that would otherwise never be expressed. Speaker identification requirements are also constitutionally infirm because they are a form of compelled speech that impermissibly burdens a political speaker's message.

The California Supreme Court failed to address the overbreadth of Section 84305 in its decision. As a re-

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raising solicitation was the subject of a $1,000 fine. (*Infra* at fn.9.)

For example, a candidate or a political committee not controlled by a candidate could produce and mail a fundraising appeal for a charity under section 89510. If the mailing failed to include the proper speaker identification, the sender of the mailing could be fined up to $2,000 for violation of section 84305.

sult, the threat of enforcement continues to impair the freedom of speech of countless individuals and committees in California—not simply candidates and their controlled committees.[4]

In its recent decision in *U.S. v. Nat'l Treasury Employees Union* (1995) —— U.S. ——, 1995 WL 68442 (U.S.), relief to the plaintiffs could be granted to an entire class of persons without the necessity to reach the possible overbreadth issue as to others not within the class. However, in the instant case Petitioners' relief is inextricably tied to the overbreadth challenge they raise.

Section 84305 is overbroad because it reaches not only electoral communications by candidates and other "committees" but also communications which are not expressions of advocacy related to any election, nor to the endorsement, support of, or opposition to any candidate or any ballot measure. Section 84305 is also overbroad because it reaches communications by all "committees" such as fundraising solicitations, solicitations on behalf of charitable organizations, and indeed, any other communication that may be lawful for the committee to undertake. (See specific case examples discussed *infra.*)

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[4] The California Court of Appeal issued an opinion which, in effect, declared Section 84305 unconstitutional as to anyone except candidates and their controlled committees, by construing the statute to apply only to candidate committees. However, when the California Supreme Court granted review, the Court of Appeal decision was superseded and vacated. (California Rules of Court, Rule 976(d).) In upholding Section 84305 as to Petitioners and other candidates and their committees, while refusing to reach the statute's application to all others, the California Supreme Court left the statute fully intact. As a result, it is currently being enforced by the California Fair Political Practices Commission. Under the California State Constitution, Art. III, Section 3.5, no state agency may refuse to enforce a statute on the basis of its perceived unconstitutionality, unless and until an appellate court has declared the statute unconstitutional. Once the California Supreme Court vacated the Court of Appeal's decision, there was no longer an appellate court decision to bar prosecution as to persons other than candidates.

The statute reaches any communication made by such committees of 201 or more pieces of mail. The price of such a *de minimis* communication may be as little as $25, given available postal rates and printing costs.

The statute penalizes precisely those less sophisticated committees which are the least likely to be aware of the complexity of the statutory scheme, and the most likely to be chilled in the exercise of their speech rights by the kind of rigid state enforcement demonstrated in this brief. The statute is also overbroad because it reaches demonstrably true speech as well as arguably false, libelous, or "deceptive" speech.

In this brief, Amicus CPAA will provide the Court with ". . . flesh and blood legal problems with data relevant and adequate to an informed judgment . . ." (*U.S. v. Nat'l Treausry Employees Union, supra,* dissenting opinion of Justice O'Connor, Slip Op. at 17.)[5] These "flesh and blood" examples demonstrate the evils of the "seeming threat or deterrence to constitutionally protected expression" for which this Court has applied the "strong medicine" of invalidation for overbreadth. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973).

The rationale used by the California Supreme Court below found that the compelled speaker identification requirements might prevent or discourage ". . . *deceptive* . . ." mailers. The state court acknowledged, however, that the requirement may ". . . deter candidates from making mass mailings. . . . Faced with a requirement that they identify themselves in all election-related mass mailings, candidates may choose not to send certain mailings at all." *Griset v. Fair Political Practices Comm., supra,* 8 Cal.4th 851, 863 [see Appendix A, A-14-15, of Petitioners' Petition for Writ of Certiorari herein].

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[5] For example, fully 15.2% of the FPPC's reported enforcement prosecutions during the period 1976-1992 for campaign-related violations of California's Political Reform Act included violations of Section 84305. Several of these prosecutions are discussed *infra.*

This Court should hold the California statute unconstitutional on its face because it, and similar statutes in other states, impermissibly infringe on rights protected by the First Amendment by prohibiting anonymity in political speech and by their impermissible overbreadth as to non-anonymous political speech. The prohibition of anonymity does not serve any public interest sufficiently compelling to justify the infringement on the First Amendment, and is not narrowly tailored to serve any interest that has been advanced to justify compelled disclosure.

ARGUMENT

I. CALIFORNIA'S REQUIREMENT FOR SPEAKER IDENTIFICATION IN POLITICAL SPEECH IS UNCONSTITUTIONAL ON ITS FACE.

Amicus CPAA agrees with Petitioners' argument that California's speaker identification requirements constitute a flat ban on anonymity in mass mailed political speech, and that such a ban is prohibited by the First Amendment and by this Court's decision in *Talley v. State of California, supra,* and cases cited therein. The First Amendment right of anonymity recognized in *Talley* applies with at least equal vigor to political speech regulated by the California statutes.

This brief will not repeat the arguments in Petitioners' Petition for Certiorari. In this Part I, CPAA will address the chilling effect of California's highly technical regulatory scheme as applied in practice by the state's enforcement agency.

A. California's Statute Illustrates the Complexity to Which Political Speaker Identification Mandates Are Prone, and Their Resulting Burdens on Speech.

California's compelled speaker identification statute is instructive in the present case because it is an example of the extreme complexity to which "next generation" rules mandating identification by political speakers are prone.

The statute, Section 84305 of the California Government Code, is part of California's Political Reform Act.[6] As adopted by the state's voters in 1974, Section 84305 established a relatively simple requirement that political mass mailings bear a postal bulk permit number that could be traced, or, at the option of the sender, the sender's name and address. A series of statutory amendments and interpretive regulations followed. However, the key amendment transformed the voluntary option of sender identification into a requirement, and a long slide down a slippery slope of increasingly complex regulation began. Each amendment and interpretive regulation that followed has made the rules governing how senders must be identified more complex, more confusing, and more intrusive. The trend toward ever more bewildering complexity shows no signs of abating, with further amendments being regularly urged on the state legislature and the FPPC. The current version of Section 84305 is set forth in the Appendix to this brief.

The complication and confusion is compounded when the numerous statutes and regulations defining Section 84305's terms are considered. The result is a daunting obstacle to individuals and organizations who wish to express their views on an election issue, by means of even a relatively small mailing to other voters. Before expressing their views, those persons must make their way through a mine field of confusing, multi-pronged, cross-referenced definitions and requirements in numerous statutes and regulations.[7]

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[6] The Political Reform Act of 1974, as amended, is found in California Government Code, Title 9, Chapters 1 through 11, Sections 81000-91015, inclusive. The act is a comprehensive regulatory scheme which, among other things, requires reporting of campaign contributions and expenditures in a manner similar to that of the Federal Election Campaign Act, provides auditing and enforcement procedures, and creates the Fair Political Practices Commission to interpret and enforce the provisions of the act. All statutory references are to the California Government Code unless otherwise noted.

[7] Regulations promulgated by the Fair Political Practices Commission under the authority of § 83112 of the California Govern-

Those who fail are subject to penalties of up to $2,000 per violation in administrative enforcement actions brought by the Fair Political Practices Commission (§§ 83115-83116.5); or, for willful violations, to misdemeanor conviction with a maximum fine of $10,000 and up to one year of incarceration (§ 91000; Calif. Penal Code § 19). The $100 penalty imposed on Ms. McIntyre for violation of the Ohio statute appears mild by comparison.

Persons covered by § 84305 are any "candidate" or "committee."[8] The definition of "candidate" in § 82007 includes, as one would expect, any individual qualified for the ballot. It also includes any individual who has received any "contribution" or made any "expenditure" with a view to eventual nomination or election to any state or local office, whether or not the individual has decided on a particular office. "Committee" as defined in § 82013 means "any person or combination of persons" that receives or makes contributions or expenditures over specified threshold amounts. (See Appendix A.)

Thus, not just the typical campaign committee organized to support a candidate or ballot measure is subject to the identification requirement. Under this broad definition, an informal group of citizens, or even a lone individual who makes "independent expenditures" also qualifies as a "committee" and is subject to the speaker identification requirement.

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ment Code are found in California Code of Regulations, Title 2, Division 6, §§ 18101-18954, inclusive, and are cited herein as "FPPC Regulation § ———."

[8] Section 84305 at one time simply applied to any "person," like the Ohio statute, reading "No person shall make an expenditure for the purpose of sending a mass mailing unless . . . ." (§ 84305 as amended by Calif. Statutes 1978, Chapter 1408.) This broad application was narrowed to "candidate" and "committee" in 1984 (Calif. Statutes 1984, Chapter 1368) in response to the decision in *Schuster v. Municipal Court*, 109 Cal.App.3d 887 (1980) in which the court invalidated a speaker identification requirement in California's Elections Code § 29410 on the grounds that it was an overly-broad infringement on the right of anonymity protected by the First Amendment. That statute, like Ohio's, applied to every "person" and all forms of printed material concerning an election.

The next question for these political speakers is whether the requirement applies to their communication. The term "mass mailing" is defined in § 82041.5 as "over two hundred substantially similar pieces of mail . . . ." FPPC Regulation § 18435 limits this to mail sent within a calendar month. (See Appendix A.)

The next questions concern the technical requirements of compliance. Some of these, although detailed, are apparent on the face of § 84305, which requires speaker identification as follows: (i) full committee name, street address, and city must appear; (ii) although a post office box may be used if the organization's address is a public record with the Secretary of State; (iii) on the outside of each mail piece;[9] (iv) and on at least one insert un-

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[9] Actual FPPC enforcement cases illustrate this point. *In re Carmen Sabatino* (Fair Political Practices Commission No. 90/369, 1993-95 CEB FPPC Enforcement Decisions 31). Mr. Sabatino was a perennial "also-ran" candidate. As part of his political activism in the community, Mr. Sabatino published an "alternative newsletter" that was mailed to as many as 300 subscribers and distributed for free. When Mr. Sabatino later ran for office, he reprinted an issue of his newsletter and mailed it to 7,000 voters. Inside, he inserted his campaign literature. The FPPC imposed a $2,000 fine for this improper "mass mailing," while finding:

> Although it did not contain the name and address of respondent on the outside of the pieces mailed, it did contain his name and address as publisher on the second page of the newsletter. The campaign literature enclosed in the newsletter also contained respondent's name and address on its outside. Neither of these identifications, however, were visible from the outside of the mail pieces. (*Id.* at p. 2.)

Another example of the overly technical nature of the statute and its enforcement is: *In the Matter of Assemblyman Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy* (Fair Political Practices Commission No. FC-86/512, 1987-1989 CEB FPPC Enforcement Decisions 123). There, the FPPC imposed a fine of $1,000 upon the respondents for sending a *fundraising letter* which did not comply with the California speaker identification requirements.

The mass mailing was a fundraising letter sent by Assemblyman Harvey's committee. The format of the solicitation was a letter from then-California Governor George Deukmejian, endorsing Assemblyman Harvey. Harvey was clearly identified as the endorsee,

less the sender is only a single candidate or committee, in which case identification is required only on the outside of each mail piece; (v) in no less than 6-point type; and (vi) in a color or print which contrasts with the background so as to be easily legible.

The technical requirements of compliance, however, also include determining and using the appropriate name for the sender, a determination that can be quite difficult. One such requirement is apparent from the face of § 84305: "(c) If the sender . . . is a controlled committee, the name of the person controlling the committee shall be included . . . ." The term "controlled committee" is defined in § 82016 as:

> a committee which is controlled directly or indirectly by a candidate [defined in § 82007, see discussion above] or state measure [defined in § 82051] proponent [defined in § 82047.6 by reference to the definition in California Elections Code § 3502] or which acts jointly [formerly defined in FPPC Regulations § 18585, repealed in 1976, Register 76, No. 16] with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

Including the name of the controlling candidate or proponent in the identification is only a start toward full compliance.[10] First, if a committee's principal activity is

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and the mailing contained solicitation materials directing contributors to make checks payable to Harvey's committee and to return the checks in a "business return envelope" addressed to Harvey's committee. However, the mailing did not comply with the requirements of California law because it did not include Harvey's full committee name and address on the *outside* envelope.

[10] In another Section 84305 enforcement action, the FPPC imposed a $1,000 fine on a county supervisor who mailed to voters a tabloid-style campaign mailing that identified a different "sender" than the statute required, but otherwise complied with the location,

the support of or opposition to a ballot measure, § 84107 requires that reference to support or opposition to the ballot measure number be included "in any reference to the committee required by law." [11]

Second, if the sending committee qualifies as a "sponsored committee," the sponsor's name must be included in the identification on the mailing. There is no reference to this special identification requirement for "sponsored" committees *in § 84305*. It is only by reading several other provisions together that the requirement is revealed. Section 84102 provides, in relevant part, that "[i]n the case of a sponsored committee, the name of the committee shall include the name of its sponsor." The requirement for identification of the sponsor is made applicable to mass mailings by virtue of section 84106, which provides: "(a) Whenever identification of a sponsored committee is required by this title, the identification

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size, and legibility requirements of the statute. (*In the Matter of Barbara Riordan and "Barbara Riordan for Supervisor Committee"* (Fair Political Practices Commission No. 88/583, 1987-1989 CEB FPPC Enforcement Decisions 881). The mailing identified the sender as "Yucaipa Citizens for Supervisor Riordan Re-election." The FPPC found that Yucaipa supporters of the Supervisor did in fact conceive, design and print the newsletter. However, it imposed a fine because, under § 84305 and FPPC Regulation § 18435, "Barbara Riordan for Supervisor Committee," the exact name of the committee that paid for the mailing, should have been identified.

[11] In another § 84305 enforcement case, the FPPC fined a local, grass-roots citizens committee $2,000. *In the Matter of Alliance for Mission Viejo—Yes on Measure A, Yes on Recall* (Fair Political Practices Commission No. 90/163, 1990-1992 CEB FPPC Enforcement Decisions 183). A citizens group paid for and sent a mass mailing containing a political statement by a well-known local figure, Orange County Supervisor Tom Riley, regarding *his* position on the impact of a local ballot measure, a position with which the citizens group agreed. The mailing used Riley's letterhead with his name and address. The name and address of the citizens group did not appear on the mailing. When the committee learned that the statute required its name and address to appear on the mailing, it promptly reported its omission to the FPPC. Although the violation was inadvertent and voluntarily reported, the FPPC imposed the maximum administrative fine of $2,000.

shall include the full name of the committee . . . ." [12] (These statutes are set forth in full in Appendix A.)

Under section 82048.7, a committee is deemed to be "sponsored" by any "person" that collects contributions for the committee through payroll deductions or dues from its members, officers, or employees; provides administrative services to the committee; participates in setting fundraising and spending policies for the committee; or contributes 80% or more of the committee's funds.

Finally, FPPC Regulation § 18435 defines "sender" as ". . . the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing . . . . " (See

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[12] In yet another Section 84305 enforcement action, the FPPC imposed a $4,000 fine on a local, gross-roots group of voters, whose members were unaware of the fine points of campaign mailing identification. *In the Matter of Riverside Tomorrow—Riverside Landowners & Arlington Heights Landowners Association Committee* (Fair Political Practices Commission No. 88/239, 1990-1992 CEB FPPC Enforcement Decisions 731). Their committee sent two mass mailings which failed to include the name of the committee's sponsor in the name of the committee. The first mailing urged a "no" vote on a local ballot measure, and contained the sender identification "Riverside Tomorrow-A Citizens' Lobby" together with the sender's address. However, that identification lacked the name of the *sponsoring* organization, the Arlington Heights Landowners Association.

The second mailing bore the same sender name and address. However, this mailing also contained a cover letter with the name and logo of the "Arlington Heights Citizens Association." The FPPC's enforcement decision, while noting that "the committee did not have any prior experience with campaign committees or reporting requirements," listed as "factors in aggravation":

> . . . the mailers' identification deprived the public of knowledge of [Arlington Heights Landowners Association]'s involvement in the mailers. This information would have allowed the voters to better evaluate the mailers' contents. . . . Furthermore, the Measure E mailing was identified on the inside as being from the Arlington Heights *Citizens* Association rather that [sic] the Arlington Heights *Landowners* Association. (*Id.* at 737.)

Appendix A.)[13] This provides for even greater complications when two or more candidates or committees are involved in the political "mass mailing."

Only after working through all of these definitions can a speaker subject to these identification requirements determine what form the required identification must take.

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[13] In another Section 84305 enforcement case, the FPPC imposed a $2,000 fine on the California Judges Association's Committee for Public Responsibility ("CJA-CPR"), formed to oppose a statewide ballot measure which would have capped state judge's salaries. *In the Matter of California Judges Association—Committee for Public Responsibility* (Fair Political Practices Commission No. 89/186, 1990-1992 CEB FPPC Enforcement Decisions 27). Once again, anonymity and accountability were never the issues.

The committee designed and produced 180,000 "Dear Friend" postcards urging recipients to join with several organizations, *including the California Judges Association,* in opposing the ballot measure. Individual judges signed and sent the postcards to voters in their jurisdictions. The committee paid most of the postage costs. The FPPC found that the California Judges Association violated the law because:

> Neither the front or the back of the postcard contained the name, street address and city of the CJA-CPR committee, which qualified as the "sender" of the mass mailing pursuant to Regulation 18435. (*Id.* at 32.)

The FPPC noted as a "Factor in Aggravation" that "recipients of the 'Dear Friend' postcards were not aware that CJA-CPR was the true sender of the mailing rather than the individual judge who signed the postcard." The committee of judges was fined, notwithstanding the FPPC's finding in mitigation that:

> The CJA-CPR members responsible for designing and reviewing the postcard were relatively inexperienced in political campaigns and were not aware of the sender identification requirement for mass mailings. The committee believed that since the postcards were sent by individual judges that they did not require committee identification. . . . (*Id.* at 32.)

II. CALIFORNIA'S SPEAKER IDENTIFICATION STATUTE IS UNCONSTITUTIONALLY OVERBROAD IN ITS APPLICATION TO PROTECTED POLITICAL SPEECH.

A. California's Statute Compels Speech that Impermissibly Burdens the Speaker's Message, Further Infringing on the First Amendment Freedoms of Political Speakers.

There is another aspect of speaker identification requirements that was not present in *McIntyre*. Unlike campaign finance reporting requirements, Section 84305 affirmatively compels all covered speakers to disclose the speaker's identity and often the speaker's affiliations, *all as part of the communication itself*. The required statements are thus content-based, compelled speech.

Section 84305 compels all persons and organizations that are "committees" and wish to engage in written political expression, including personal correspondence, to disclose their identity as part of the communication itself.[14] The effect of this requirement is to "burden[] a speaker with unwanted speech" during the course of the speaker's own message. *See Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 800 (1988). Because it "[m]andat[es] speech that a speaker would not otherwise make," Section 84305 is a content-based regulation of speech, "subject to exacting First Amendment scrutiny." *Id.* at 795, 798; *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

In *Riley v. National Federation of the Blind of N.C., supra*, this Court struck down a North Carolina statute that required professional fundraisers for charitable organizations to tell potential donors the percentage of contributions collected during the previous twelve months

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[14] Section 84305 compels candidates and committees that send as few as 201 substantially similar pieces of mail to identify themselves on the mailing, and where applicable, list the names of persons "controlling" or "sponsoring" them. See section I.A. of this brief.

that had actually gone to charity. Observing "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored," the Court held that the statute was a content-based regulation of speech, and could not withstand "exacting First Amendment scrutiny." *Id.* at 798, 800.

A statute compelling speech fails the narrow tailoring requirement when government has the option of itself publishing information obtained from mandatory disclosure forms but elects instead to compel a private speaker to include the information in the speaker's own message. *Riley v. National Federation of the Blind of N.C.*, 487 U.S. at 800; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981).[15] In *Riley*, the Court found that the speech compelled by the North Carolina statute was unduly burdensome and not narrowly tailored because other provisions of the North Carolina law required professional fundraisers to file financial disclosure forms that detailed the share of funds allocated to overhead as opposed to charity. Publications *by the state* of that detailed information would serve the same public information, anti-deception purpose "without burdening a speaker with unwanted speech during the course of a solicitation." *Riley, supra*, 487 U.S. at 800. See also *Citizens Against Rent Control v. City of Berkeley, supra* 454 U.S. at 298.

Section 84305 is not narrowly tailored because California can and does require those who make expenditures for campaign speech to file detailed campaign finance disclosure forms. The information provided on those

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[15] In *Citizens Against Rent Control v. Berkeley, supra*, this Court held that a city's $250 limit on contributions to local ballot measure committees contravened First Amendment speech and association rights, where a companion provision requiring the city to publish lists of contributors before each election obviated the risk that "voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure . . . ." *Id.*, 454 U.S. at 298.

forms is sufficient to enable the state to achieve the statute's purported purpose of identifying those who support or control the candidate or ballot measure committee—that is their financial backers. Each contribution or expenditure totalling $100 or more must be identified by the name and address of the contributor or of the person paid, the object or purpose for which an expenditure was made, and the amount of the contribution or the expenditure. § 84211. Campaign contribution and expenditure reports must be filed regularly, including pre-election reports, in the jurisdiction where the committee has been active in supporting or opposing candidates or ballot measures. §§ 84200-84219.[16]

The detailed information contained in these campaign finance reports is also more than sufficient for the other purpose the California Supreme Court found to be served by Section 84305: giving California's voters a mechanism by which they may better evaluate [the] validity of a political message. See *Griset v. Fair Political Practices Comm., supra* 8 Cal.4th 851, 865. [see Petitioners' Appendix A, p. A-17.] As in *Riley* and *Citizens Against Rent Control v. Berkeley*, California could, if it chose, publish the information from the campaign finance statements in order to achieve that voter education purpose.

Reporting requirements are thus a readily available and much less intrusive means of achieving the state's goals of educating the public and protecting it from fraud and deception. *Riley*, 487 U.S. at 800; *cf. Citizens Against*

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[16] California law requires candidates, ballot measure proponents and opponents, and political action committees to file comprehensive pre-election campaign finance statements approximately two months and again twelve days before each election, and requires disclosure within twenty-four hours if "late contributions" or "late independent expenditures" are made in the final days before an election. *See* Calif. Gov't Code §§ 84200.5, 84200.7, 84200.8, 84203, 84203.5. This Court upheld similar campaign finance filing requirements for federal elections in *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976).

Rent Control v. Berkeley, 454 U.S. at 298. Assuming *arguendo* that identification, on the mailing itself, of the "sender" of a political mass mailing, might be a more efficient means for California to educate voters or identify those who distribute false statements, it is still beside the point. As this Court declared in striking down another portion of the North Carolina charitable solicitation law,

> . . . North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. [Citation omitted.] If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency. [Citations.]

Riley, 487 U.S. at 795.

The *Riley* decision is thus fully consistent with both *Talley v. State of California, supra*, which struck down a law requiring identification in a speaker's own advocacy materials, and *Buckley v. Valeo, supra*, which upheld campaign finance report filing requirements. Public filing requirements like those upheld in *Buckley v. Valeo* do not impose unwanted speech on a private speaker's own communications to the public. Such filing requirements are constitutional if supported by a compelling public purpose. On the other hand, statutes such as the charitable-share disclosure requirement invalidated in *Riley* or the speaker identification requirement in Section 84305, directly burden speech. When less burdensome alternatives exist, Section 84305's forms of compelled speech cannot withstand exacting First Amendment scrutiny.

B. No Sufficiently Compelling State Interest Has Been Advanced to Justify Compelled Speaker Identification in Political Speech.

Amicus CPAA agrees with Petitioners that the California court erred in finding that the state's interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity to be sufficient to justify compelled speaker identification.

Petitioners correctly point out that the voters who hear an anonymous message should be entitled to evaluate all aspects of it, including its source, whether anonymous or not. (Petition, pp. 11-12.)

The Section 84305 scheme requires, in the guise of a speaker identification requirement, disclosure of the speaker's affiliations. Political speakers are compelled to identify on their mailings not only themselves but also those with whom they are associated, and often in a manner that conveys a misleading and politically detrimental impression of the prominence of the role played in the committee by the "sponsor" or "controlling" individual.[17] The result goes beyond mere identification to burden the speaker's message with what may be an unwanted message about the speaker's affiliations.

C. Speaker Identification Statutes Which Are Inherently Overbroad Cannot Realistically Be Narrowly Tailored to Cover Only Speech that May Be Regulated.

The California court also found that Section 84305 serves to identify persons who send arguably false, misleading or deceptive statements and that identification of such persons is a sufficiently compelling reason to justify the statute's infringement on rights protected by the First Amendment. *Griset, supra,* 8 Cal.4th at 865. (Petitioners' Appendix at A-14-16.) The proper analysis of this conten-

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[17] For examle, the FPPC, interpreting the "sponsored committee" and "controlled committee" provisions, directed a committee formed to oppose a local ballot measure to identify itself as a committee "controlled" by an elected county supervisor and not as a "sponsored committee." This interpretation was made notwithstanding the fact that the county supervisor was one of sixteen members of the committee's steering committee, thirteen of the other members served in a representative capacity on behalf of the American Lung Association, the American Heart Association, the American Cancer Society, and a variety of other nonprofit organizations, and the nonprofit organizations were significant contributors to the committee. *See Olson* Advice Letter, Calif. FPPC No. A-89-304 (6/19/89).

tion, however, is not whether the state has a compelling interest in prohibiting false statements in political campaigns, but whether the speaker identification requirement is narrowly tailored to that end.

This is precisely the same problem that this Court held required invalidation of the speaker identification requirement in *Talley*:

> "Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance *is in no manner so limited,* nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these are any other supposed evils. [362 U.S. at 64 (emphasis added).]

Section 84305 has the same problem as did the speaker identification ordinance invalidated in *Talley*: it is impermissibly overbroad. It must be invalidated for that reason alone. The result of California's complex statutory scheme and the FPPC's policy of rigid, hypertechnical, absolute-liability enforcement is to require any citizen who wants to be heard in state or local political campaigns in California either to become thoroughly familiar with a set of statutes and regulations that is difficult for experienced attorneys (even the state's judges) to master, or to engage legal counsel to advise on compliance. Hiring an attorney, however, should not be a condition of safely exercising one's First Amendment right to unfettered political expression.

CONCLUSION

For the reasons stated above, this Court should grant Petitioners' Petition for a Writ of Certiorari so that this matter may be considered in full.

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APPENDIX

APPENDIX A

California Government Code § 84305

(a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

(c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a). [West's Annotated Codes]

California Government Code Section 82013

82013. "Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year.

(b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or commitees.

A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

California Government Code Section 82048.7

82048.7. (a) "Sponsored committee" means a committee, other than a candidate controlled committee, which has one or more sponsors. Any person, except a candidate or other individual, may sponsor a committee.

(b) A person sponsors a committee if any of the following apply:

(1) The committee receives 80 percent or more of its contributions from the person or its members, officers, employees, or shareholders.

(2) The person collects contributions for the committee by use of payroll deductions or dues from its members, officers, or employees.

(3) The person alone or in combination with other organizations, provides all or nearly all of the administrative services for the committee.

(4) The person, alone or in combination with other organizations, sets the policies for soliciting contributions or making expenditures of committee funds.

California Government Code Section 84102

84102. The statement of organization required by Section 84101 shall include:

(a) The name, street address and telephone number, if any, of the Committee. In the case of a sponsored committee, the name of the committee shall include the name of its sponsor. Whenever a committee has more than one sponsor, and the sponsors are members of an industry or other identifiable group, a term identifying that industry or group shall be included in the name of the committee.

(b) In the case of a sponsored committee, the name, street address and telephone number of each sponsor.

(c) The full name, street address and telephone number, if any, of the treasurer and other principal officers.

(d) The full name and office sought by any candidate and the title and ballot number, if any, of any measure, which the committee supports or opposes as its primary activity. A committee which does not support or oppose one or more candidates or ballot measures as its primary activity shall provide a brief description of its political activities, including whether it supports or opposes candidates or measures and whether such candidates or measures have common characteristics such as a political party affiliation.

(e) A statement whether the committee is independent or controlled, and if it is controlled, the name of each candidate, or state measure proponent by which it is controlled, or the name of any controlled committee with which it acts jointly. If a committee is controlled by a candidate for partisan office, the controlled committee shall indicate the political party, if any, with which the candidate is affiliated.

(f) The disposition of surplus funds which will be made in the event of dissolution.

(g) Such other information as shall be required by the rules or regulations of the commission consistent with the purposes and provisions of this chapter.

California Government Code Section 84106

84106. (a) Whenever identification of a sponsored committee is required by this title, the identification shall include the full name of the committee as contained in its statement of organization.

(b) A sponsored committee shall use only one name in its statement of organization.

California Government Code Section 84107

84107. Within 30 days of the designation of the numerical order of propositions appearing on the ballot, any committee which has as its principal activity the support of or opposition to a ballot measure, shall, if supporting the measure, include the statement, "a committee for Proposition ——," or, if opposing the measure, include the statement, "a committee against Proposition ——," in any reference to the committee required by law.

2 California Code of Regulations Section 18435

(a) A "mass mailing" has been made when over two hundred substantially similar pieces of mail have been sent within a calendar month.

(b) The sender, as used in Government Code Section 84305, is the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing which are reportable under Government Code Sections 84200-84217.

(c) For purposes of this section to "pay for" a share of the cost of a mass mailing means to make, to promise to make, or to incur an obligation to make, any payment:

(1) To any person for the design, printing, postage, materials or other costs (including salaries, fees, or commissions) of the mailing; or

(2) As a fee or other consideration for an endorsement or, in the case of a ballot measure, support or opposition, in the mailing.

No. 94-1456

Supreme Court, U.S.
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vs.
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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners submit this Reply to correct any erroneous impression of the facts or the legal issues in this case that may otherwise be given by Respondent's Brief in Opposition (cited herein as "Resp. Brief").

I

Respondent's characterization of the mailers that were sent by Petitioners, and which gave rise to this case, as " 'smear' or 'hit' pieces" (Resp. Brief, p. 2) has no support in the record below, even though in quotation marks in Respondent's Brief, and is in fact erroneous. Neither that characterization nor any similar unfavorable characterization was given to the mailers by the California Supreme Court (Petitioner's Appendix A), by the California Court of Appeal (Pet. App. B), by the trial court (Pet. Apps. C, D), by Respondent Fair Political Practices Commission itself in its Decision (Pet. App. E), by the administrative law judge in his Proposed

Decision (also Pet. App. E), or by Respondent itself in its Accusation that initiated the administrative hearing (not included in the Appendices). To the contrary, the dissent in the Court of Appeal stated that "the mailers under consideration here, which effusively praise Griset and harshly criticize his opponent, are relatively tame." (Pet. App., p. B 16, which also further describes the mailers.) The unsupported pejorative characterization given to the mailers by Respondent should not give this Court the impression that the political speech in this case may have been scurrilous or untrue and outside the scope of the protection of the First Amendment. The issue here — as it was in the courts below — is not the merit of the speech in the mailers, but whether protected political speech may constitutionally be required to include the identity of the speaker.

II

Respondent's characterization of the statute in issue in this case, California Government Code § 84305, as "narrowly tailored" (Resp. Brief, p. 5) is illusory. The statute's application "only" to candidates and political committees is neither a significant limitation in practice nor a limitation that saves it from unconstitutionality. It is not narrow in practice because "committee" includes not only candidates and their campaign committees, but any person who spends $1,000 or more to express that person's views on the election of a candidate or passage of a ballot measure. (See Cal. Gov. Code § 82013, Pet. App. F; and Petition pp. 9-10.) No matter how Respondent describes the statute, it applies to speech directed to voters concerning the election of candidates and passage of ballot measures.

Section 84305's application "only" to mass mailings of candidates and political committees likewise is neither a narrowing that is significant in practice nor one that saves the statute from unconstitutionality. "Mass

mailings" are mailings of more than two hundred pieces of mail (Cal. Gov. Code § 82041.5, Pet. App. F), such a low threshold that it includes virtually all mailers that would be large enough in quantity to have an impact. Section 84305 in fact covers the principal means of communication to voters in state and local campaigns. (See the dissent in the California Court of Appeal, Pet. App., p. B 13, explaining why "political campaigns in southern California must be conducted primarily by mail.")

Respondent's characterization of § 84305 as having a narrow application simply emphasizes its application to political expression — speech that is at the heart of the protections of the First Amendment.

III

Respondent erroneously contends that the question decided by the California Supreme Court — whether " 'a statute that prohibits anonymous mass mailings by candidates or candidate-controlled committees in political campaigns violates the First Amendment' " — is not included in the "Questions Presented" by Petitioners. (Resp. Brief, pp. 5-7.) To the contrary, that question is included in Petitioners' question number 1 — whether the statute is unconstitutional on its face, that is, in any application — and that question is precisely presented in question number 2 — whether the statute is "unconstitutional under the First Amendment as applied to candidates and their campaign committees."

IV

Respondent's inference that review of the constitutional issues in this case is somehow inhibited by the nature of the appeal from the trial court's denial of a petition for a writ of administrative mandamus is erroneous. (Resp. Brief, p. 7.)

Respondent does not provide any support for this inference, and it is not supported by the record in the courts below. The unconstitutionality of § 84305 under the First Amendment was the sole basis for Petitioners' challenge in the trial court to the fine imposed by Respondent. The trial court denied Petitioners the relief they sought, finding that the statute was constitutional as applied to candidates and their campaign committees (including Petitioners), and saving the statute from what it perceived as its unconstitutional overbreadth in its application to other persons by construing the statute as applying only to candidates and their campaign committees. (Trial court's Minute Order, Pet. App. D.) The Court of Appeal upheld the trial court on both aspects of its ruling (Pet. App. B). The California Supreme Court upheld the statute as applied to candidates and their campaign committees, but declined to consider the overbreadth issue (Pet. App., p. A 3).

Along the same lines, Respondent also says that "Petitioners have abandoned the mundane issue whether the administrative fine levied against them was legal, for the bright lights of a constitutional facial challenge." (Resp. Brief, p. 6.) Since the facts of this case were stipulated to, and the "bright light" of a constitutional challenge was the only issue in the trial court proceeding, there were no other issues, mundane or not.

Respondent has not previously raised this argument concerning the procedural posture of the case, and no lower court has considered the procedural posture of the case as limiting review of the constitutional issue. The constitutional issue is squarely presented in this case, uncomplicated by any other issues of state law applicable to the case.

V

Respondent is correct, however, in suggesting that this Court might make a "sweeping pronouncement" in the pending *McIntyre* case (*McIntyre v. Ohio Elections Commission*, 67 Ohio St.3d 391 (618 N.E.2d 152) (1993), *cert. granted*, 114 S.Ct. 1047 (1994, No. 93-986)) that would invalidate any speaker identification requirement applicable to political speech, including § 84305. (Resp. Brief, p. 8.) That possibility, however, is not grounds for denial of certiorari in this case, as Respondent suggests, but instead would permit this Court to deal with the unconstitutionality of § 84305 by granting certiorari and either summarily reversing the decision by the California Supreme Court, or by remanding the case to the California Supreme Court to reconsider its decision in light of such a decision in *McIntyre*.

Petitioners again respectfully urge this Court to grant their petition for a writ of certiorari.

DATED: April 7, 1995.

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